Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an open case before it on direct review, a state court may refuse to recognize this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) as a controlling statement of federal law by relying on state decisional law that this Court has specifically identified as refusing to accord full retroactive effect to *Davis*?

2. Whether a state may hold out in papers filed in this Court and to taxpayers in general what plainly appears to be a clear and certain post-deprivation remedy for unconstitutional taxes and then declare, only after the disputed taxes have been paid, that no such remedy exists?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner, William T. Atkins, and his wife, Susan A. Atkins, and the Oregon Department of Revenue.

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DEPARTMENT OF REVENUE, STATE OF OREGON,
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PETITION FOR A WRIT OF CERTIORARI

William T. Atkins respectfully petitions this Court for a writ of certiorari to the Supreme Court of Oregon.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (App. A. 1a-18a) is reported at 320 Or. 713, 894 P.2d 449 (1995). The opinion of the Oregon Tax Court (App. C, 20a-27a) is reported at 13 Or. Tax 65 (1994). The judgment of the Oregon Tax Court (App. D, 28a) is unpublished.

JURISDICTION

The Supreme Court of Oregon issued its opinion on April 6, 1995 affirming the Oregon Tax Court and denying petitioner's entitlement to refunds for the 1987 tax

year. (App. A, 1a) Petitioner's petition for reconsideration was denied on May 23, 1995. (App. B, 19a) This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111 provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amend. XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Pertinent statutory provisions of Oregon's personal income tax scheme are set forth in App. E, *infra*.

STATEMENT OF THE CASE

This case arises in the wake of this Court's decisions in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); and *Reich v. Collins*, 115 S. Ct. 547 (1994). In *Davis*, this Court held that state taxing schemes which discriminate in favor of local and state retirees and against federal retirees are invalid under 4 U.S.C. § 111. Oregon, like Michigan, imposed a discriminatory tax upon federal retirees. In *Harper*, this Court held that every court must give retroactive effect to the *Davis* decision. In so holding, this Court specifically identified the court below as one of several state courts that had "refused to accord full retroactive effect to *Davis* as a controlling statement of federal law." *Harper*, 113 S. Ct. at 2515 (footnote omitted). In *Reich*, this Court held in a *Davis*-related case that a state may not "hold out what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 115 S. Ct. at 549.

This case involves the refusal by State courts to follow the mandates of this Court's decisions in *Reich* and *Harper*. The courts of Oregon continue to refuse to give full retroactive effect to this Court's decision in *Davis*. In addition, the courts of Oregon have now declared that the very state remedy held to be available to Oregon federal retirees in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992) to remedy Oregon's violation of 4 U.S.C. § 111, does not exist.

In 1988, the petitioner filed a timely personal income tax return, reporting and paying the Oregon personal income tax on one-half of his 1987 military retired pay.[1]

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[1] During the years in issue in this case, the petitioner's wife remained a California resident. The other half of petitioner's

In 1991, the respondent commenced an audit proceeding of the petitioner's 1987, 1988 and 1989 returns and asserted that the entirety of petitioner's military retired pay was subject to Oregon's personal income tax.[2] In response to the respondent's action, the petitioner timely perfected his objections under, *inter alia*, *Or. Rev. Stat.* § 305.265(5)(App. E, 38a). The petitioner asserted that the respondent, in discharging its obligations in the audit proceeding to determine the correct measure of the tax, was required to give effect to this Court's decision in *Davis*.[3]

The petitioner exhausted all administrative remedies before the respondent. In its audit proceeding, the respondent refused to give retroactive effect to this Court's decision in *Davis* as the controlling interpretation of federal law. During the course of the respondent's proceeding against the petitioner, the petitioner paid all sums asserted due by the respondent in order to avoid the various sanctions and summary remedies imposed under Oregon's scheme and to satisfy Oregon's jurisdictional payment requirement to obtain judicial review. *See, e.g.*, Or. Rev. Stat. §§ 305.220, 305.419, 305.990(4), 305.992, 314.400, 314.525(3). (App. E, 30a, 39a-41a).

The petitioner sought judicial relief before the Oregon Tax Court. The Oregon Tax Court, relying on Oregon's *1992* reconfigured remedial scheme, denied the petitioner's claim for relief with respect to the taxes returned in 1988 on petitioner's 1987 military retired pay. The

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military retired pay for 1987 was originally reported as his wife's California income under California's community property law.

[2] Throughout the proceedings below, the petitioner appeared *pro se*.

[3] Consistent with settled Oregon practice, the petitioner during the course of the respondent's audit proceeding also perfected his objections for the record by filing an amended 1987 return based on this Court's decision in *Davis*. *See* Or. Rev. Stat. §§ 305.270(2), 314.415. (App. E at 33a, 36a).

BEST AVAIL

Oregon Tax Court held that under Oregon's newly declared scheme the petitioner was only entitled to limited relief—the return of only that part of the 1987 tax liability that was paid in and after 1991. The tax court so held, notwithstanding the fact that: i) the petitioner had timely and properly raised his objections and had properly invoked the settled refund remedy for personal income taxes that had been available to Oregon income taxpayers for over sixty years; ii) the respondent had violated its obligation to determine the correct measure of the tax by refusing to give retroactive effect to this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); and iii) Oregon does not provide taxpayers a meaningful opportunity to withhold payment and to obtain a predeprivation determination of a tax's validity.

Upon appeal, the Supreme Court of Oregon affirmed the decision of the Tax Court. Upon issuance of its decision, the petitioner petitioned for reconsideration on the grounds that the decision of the Supreme Court of Oregon was contrary to this Court's decision in *Reich v. Collins*, 115 S. Ct. 547 (1994), in that the state of Oregon had engaged in a "'bait and switch'" identical to that of Georgia and the court below had further permitted the State to engage in precisely the same type of remedial "[n]ovelty" proscribed by this Court in *Reich*. The Supreme Court of Oregon summarily denied the petition for reconsideration.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial public importance concerning the rights of taxpayers to obtain refunds of taxes unconstitutionally or illegally imposed upon them and the obligation of state courts under the Supremacy Clause to give effect to this Court's decisions. In Oregon alone this case implicates the rights of approximately forty thousand elderly federal retirees and the estates of the thousands of federal retirees who have died during Oregon's war of attrition against them. In several

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other states, resolution of the question presented should finally determine whether states may retain hundreds of millions of dollars of taxes unconstitutionally imposed upon both federal annuitants and federal employees.

In addition, the issues in this case have far-reaching consequences that transcend their impact on federal retirees. The mandates of *Reich* and *Harper* are not limited to federal retirees—the issue of whether a state has provided a clear and certain remedy has arisen and will continue to arise in a variety of state tax cases. Here, the result below is in irreconcilable conflict with the mandates of *Reich* and *Harper*. Indeed, the holding below "violates the Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995). It also represents a continuation of the disturbing trend established in recent tax litigation that financial considerations render the doctrine of *stare decisis* pliable.[4] In this regard, Oregon has pursued the unseemly strategy of *win at all costs*. For example, it is now apparent that in evading review by this Court in the first Oregon *Davis*-related case,[5] Oregon asserted one position before this Court as to the available adequate state remedy for its *Davis*-related violations of federal law, while simultaneously asserting to the Oregon Supreme Court in another *Davis*-related case,[6] that the very same state remedy never existed. Thus, review by this Court is necessary to protect the integrity of this Court's certiorari process, to assure that the dictates of

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[4] As the decisions of this Court over the last several terms confirm, presumably in an effort to protect states from the fiscal consequences of this Court's decisions, some state courts have adopted attenuated constructions of state refund procedures or employed novel procedural requirements. *See, e.g., Reich v. Collins*, 115 S. Ct. 547 (1994); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

[5] *See Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992).

[6] *See Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992).

federal due process are applied uniformly by all states, and to signal to all state courts that review by this Court of due process violations will not be evaded by facile interpretations of state law.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioner, are relegated exclusively to state courts to press their claims for refunds. But it is state courts that have demonstrated the greatest difficulty in applying the Fourteenth Amendment. This Court is the only federal court that can hear the retirees' claims. Absent review by this Court, "[t]he State too easily avoids its responsibilities and . . . go[es] its way unimpeded and unburdened with any remedy for those who have been wronged during the period of [Oregon's] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).

1. After this Court's decision in *Harper*, many states, either by opinion of the state's highest court or stipulation, recognized that refunds of their states' unconstitutionally collected taxes were required.[7] Likewise, following the announcement of this Court's mandate in *Reich*, the State of Georgia immediately acknowledged its re-

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[7] *See, e.g., Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), *cert. denied*, 113 S. Ct. 3034 (1993) (settled for full refunds with interest); *Hagge v. Iowa Dep't of Revenue and Fin.*, 504 N.W.2d 448 (Iowa 1993) (granting full refunds with interest); *Sheehy v. State*, 250 Mont. 437, 820 P.2d 1257 (1991), *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993) (settled for full refunds with interest); *Strelecki v. Oklahoma Tax Comm'n*, 872 P.2d 910 (Okla. 1993) (granting full refunds plus interest); *Brumley v. Utah State Tax Comm'n*, 868 P.2d 796 (Utah 1993) (same); *Barker v. State*, 249 Kan. 186, 815 P.2d 46 (1991), *rev'd*, 503 U.S. 594 (1992) (same); *Bass v. State*, 302 S.C. 250, 395 S.E.2d 171 (1990), *cert. granted, vacated and remanded*, 501 U.S. 1246 (1991), *remand*, 307 S.C. 113, 414 S.E.2d 110 (1992), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993) (settled for full refunds plus interest); *Marx v. Brown*, 632 Co. 2d 1315 (Mis. 1994) (granting full refunds with interest).

fund obligation and appropriated the settlement funds to pay all Georgia federal retirees the full refunds and interest at issue in *Reich*. *See, e.g.*, House Bill 90, House Bill 3, 1995 Georgia General Assembly.

However, notwithstanding that the tide has decisively turned in the federal retirees' favor, several states continue to pursue their war of attrition against federal retirees. For example, on remand in *Harper*, Virginia continues to advocate a position that is indistinguishable from the very position rejected by this Court in *Reich*. *See Harper v. Virginia Dept. of Taxation*, No. 940326, Virginia Supreme Court ("Harper III"). Similarly, on remand in *Duffy v. Wetzler*, New York continues in its effort to evade even the refund obligations it previously acknowledged as due before the appellate courts of New York and this Court. *See Duffy v. Wetzler* and *Alderman v. Wetzler*, Index Nos. 7706/89 and 6193/91, N.Y. Supreme Court, Queens County. In Arizona, federal retirees are on appeal for a second time as state tax officials continue their efforts to reconfigure Arizona's refund scheme. *See Bohn v. Waddell*, appeal pending, No. 1 CA-TX, 94-009 (Ariz. Ct. App.). In addition, Arizona continues to enforce, while denying refunds, a scheme which indisputably discriminatorily taxes *current* federal employees' *current* compensation while exempting the same *current* compensation of state employees. *See Kerr v. Waddell*, appeal pending, No. 1 CA-TX, 92-0010 (Ariz. Ct. App.). Finally, in Wisconsin, the state continues its efforts to minimize the amount of the refund obligation finally adjudged by urging that Wisconsin's settled refund scheme does not exist. *See, e.g., Wisconsin Dep't of Revenue v. Hogan*, No. 95-0438 (Ct. App. District IV).

The arguments being advanced in these states are utterly irreconcilable with *Reich*. This Court held in *Reich* that a "State may not . . . reconfigure its scheme, unfairly, in midcourse—to 'bait and switch' . . . ." *Reich*,

115 S. Ct. at 550. Yet, undaunted by their obligations under the Supremacy Clause, these states, like Oregon, continue to urge that " '*novelty* in procedural requirements' " may be employed " 'to thwart review in this Court.' " *Id.* at 551.

Indeed, Oregon is of the apparent view that this Court's decisions do not apply in Oregon unless and until this Court reviews an Oregon decision. The respondent's position below was that *Reich* had no "relevance" to this case. *See, e.g.,* Defendant's Supplemental Memorandum, dated December 20, 1994. Its contemporaneous statement of position in another pending *Davis*-related case is just as breathtaking for its defiant disregard for the State's obligation under the Supremacy Clause:

> *Reich v. Collins* (U.S. Supreme Court No. 98908 [sic], decided December 6, 1994) is similarly distinguishable from *Ragsdale I* and *Ragsdale's* due process analysis is binding on this court so as *to make Reich as irrelevant as Harper* unless the Oregon Supreme Court reverses itself or the U.S. Supreme Court acts to overrule *Ragsdale I.*

See Trial Memorandum of State of Oregon, December 21, 1994, at 4, *Dixon v. State of Oregon,* No. 9311-07480, Circuit Court of Oregon, Multnomah County (emphasis added).

In addition to being in irreconcilable conflict with this Court's decisions in *Reich* and *Harper,* the decision below also conflicts with the post-*Harper* decision of the Florida Supreme Court in *Department of Revenue v. Kuhnlein,* 646 So. 2d 717 (Fla. 1994). In *Kuhnlein,* the Florida Supreme Court rejected Florida's invitations to adopt "an *alleged* common law rule" and an attenuated construction of the "requirement of Florida's refund statutes" which the state had asserted barred the taxpayers' constitutional right to a refund for an "illegal tax." *Id.* at 721 (emphasis added). The Florida Supreme Court held that the State's assertions were "not

proper reasons to bar a claim based on constitutional concerns." *Id.* "[A]ny other rule self-evidently would make constitutional law subservient to the State's will." *Id.*

Thus, despite the clarity of this Court's mandates in *Reich* and *Harper*, the state courts of last resort remain split on whether a state is free to adopt a facile interpretation of state law to defeat "what plainly appears to be a 'clear and certain' post-deprivation remedy [by declaring], only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 115 S. Ct. at 549. Review by this Court is thus necessary in this case to assure, in fact, that the Fourteenth Amendment is applied uniformly in all states.

2. The decision below is irreconcilable with *Harper*. In *Harper*, this Court held that its decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), is "the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 113 S. Ct. at 2517. In the decision below, the Oregon Supreme Court refused to give *Davis* retroactive effect in this case which was open on direct review.

In this case, the underlying predicate was the commencement of an administrative audit proceeding against the petitioner by the respondent. In that proceeding the entirety of the petitioner's 1987 return was put at issue by the respondent and, irrespective of any claim made by the taxayer, the respondent as a matter of federal law was required, in making its determination, to give "full retroactive effect" to this Court's decision in *Davis*. *Harper*, 113 S. Ct. at 2517.[8]

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[8] It is indisputable that the petitioner's right to meaningful relief is protected under the Fourteenth Amendment. "A state that 'establish[es] various sanctions and summary remedies designed'

Oregon's refusal to give *Davis* retroactive effect in this case "violates the Constitution's Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995). Here, the petitioner properly asserted his *Davis* defense to the respondent's audit proceeding. *Harper* mandates that the respondent, in making its determination of the correct amount of tax due, ignore its "unconstitutional law." *Reynoldsville*, 115 S. Ct. at 1752 (Scalia, J., concurring). The provision imposing tax upon the petitioner's military retired pay "was unconstitutional . . . and was . . . as inoperative as if it had never been passed." *Id.* The inclusion of the petitioner's retired pay as an item in the measure of the tax, therefore, could not provide a basis to justify *any* part of the respondent's determination. Thus, review by this Court is necessary to insure that Oregon's "lonely eminence," *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2338 (1994), as the only state to refuse to give *Davis* full retroactive effect comes to an end.[9]

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to prompt taxpayers to 'tender . . . payments before their objections are entertained or resolved' does not provide taxpayers' meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2519-20 n.10 (1993) (citation omitted). Oregon does not provide taxpayers " 'a meaningful opportunity to withhold payment.' " *Id.* "There is no question that Oregon's statutes encourage payment of tax before litigation of a claim for relief. *See* Or. Rev. Stat. § 305.419 (tax, interest, and all penalties assessed shall be paid on or before the filing of complaint with the regular division of the Tax Court)." (App. A, 15a). *See also* Or. Rev. Stat. §§ 305.990(4), 305.992(1), 314.400, 314.525, 316.992. (App. E, 39a-41a) (imposing a panoply of sanctions, penalties and interest—exceeding 100% of the tax due for failures to pay and/or report taxes claimed due by the State).

[9] To date, this Court has not permitted a state to avoid its obligation under the Supremacy Clause to give *Davis* full retroactive effect. *See, e.g., Pledger v. Bosnick*, No. 91-375, *cert. denied*, 113 S. Ct. 3034 (1993); *Barker v. Kansas*, 91-611, *rev'd*, 503 U.S. 594 (1992); *Harper v. Virginia Dep't of Taxation*, No. 91-794, *rev'd*, 113 S. Ct. 2510 (1993); *Colorado v. Kuhn*, No. 91-980, *cert. dis-*

3. The decision below is irreconcilable with *Reich*, for precisely the reasons stated in *Reich*. For over sixty years, the settled public policy of Oregon has provided that the "provisions of the [refund] statute and regulations" under the modern Personal Income Tax Act "are not designed as traps for the unwary." 19 Op. Att'y Gen. 577, 578 (1940). (App. F, 45a). All personal income taxes in excess of those due, whatever the reason, have been refunded. And the only condition to obtain a refund plus statutory interest on the excess payment is that a taxpayer file a post-payment claim for refund within the time limits established by the general omnibus refund statute under the Personal Income Tax Act. *Id.*[10]

In addition, under settled Oregon practice, even the income tax refund claim filing requirement is liberalized. From the inception of Oregon's modern Personal Income Tax Act, Oregon has followed the informal claim doctrine of federal law:

> [A]n *informal claim* which was filed within the statutory period and which otherwise substantially com-

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missed, 504 U.S. 901 (1992); *Sheehy v. Montana Dep't of Revenue*, No. 91-1473, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, No. 91-1697, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Duffy v. Wetzler*, No. 92-521, *cert. granted and judgment vacated*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, No. 92-1276, *cert. granted and judgment vacated*, 113 S. Ct. 3028 (1993) & No. 93-908, *cert. granted and judgment reversed*, 115 S. Ct. 547 (1994).

[10] For years 1933 to 1938, claims for refund of the personal income tax had to be filed within two years of the date the tax was paid. For years after 1939, the limitation period for filing claims under the personal income tax was liberalized to the later of "three (3) years from the time the return was filed or two (2) years from the time the tax or a portion thereof was paid." Section 14, Chapter 488, Oregon Laws, 1939. The limitation provisions under the 1939 Act remain essentially unchanged under current law. *See* Or. Rev. Stat. §§ 305.270(2); 314.415(1)(b). (App. E, 33a, 36a).

> plied with the requirements of the statutes and regulations pertaining to the tax years in question may be perfected and allowed after the statutory period has elapsed.

Id. (emphasis added).[11]

In an unbroken line of precedent spanning over six decades, the Oregon Supreme Court has repeatedly recognized the right of taxpayers under Or. Rev. Stat. § 305.270, the omnibus refund statute of the Oregon Personal Income Tax Act, to obtain a refund together with statutory interest of all taxes subsequently declared invalid or unconstitutional. *See, e.g., Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939) (ordering refunds of income taxes invalidly imposed upon federal employee's compensation)[12]; *Smith, Kline & French Lab. v. State Tax Comm'n*, 241 Or. 50, 403 P.2d 375 (1965) (ordering refunds of corporate income taxes declared invalid under the Commerce Clause for years 1955 through 1958); *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (ordering refunds of personal income taxes unconstitutionally imposed in violation of the Privileges and Immunities Clause for years 1979 through 1981); *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989) (ordering refunds of personal income taxes for years *1982-1983* un-

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[11] Oregon's adoption of the federal informal claim doctrine has remained unchanged for over sixty years. Indeed, it has been codified as part of the Oregon personal income tax refund right. Or. Rev. Stat. § 314.011(3) provides that "insofar as is practicable in the administration of this chapter, the department shall apply and follow the administrative and judicial interpretations of the federal income tax law."

[12] *See also* Opinion of the Attorney General, January 24, 1940 (App. F, 43a) (recognizing in the wake of *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939), the unqualified entitlement of all federal employees, who had filed either informal or formal claims for refund under Oregon's omnibus refund statute, to obtain a refund of these invalid taxes for years 1938 and before).

constitutionally imposed upon federal obligations in violation of the doctrine of intergovernmental tax immunity). Significantly, contrary to the *novel* result in the decision below, in *Borg*, the Oregon Supreme Court expressly applied the "nondiscrimination rule of *Davis v. Michigan Dep't of Treasury*," in affirming the tax court's order of refunds with full statutory interest under Or. Rev. Stat. § 305.270. *Id.* at 1101-02.

Moreover, consistent with the strong public policy of Oregon recognizing the rights of taxpayers, the Oregon Personal Income Tax Act not only recognizes the rights of citizens to refunds with full statutory interest for taxes subsequently declared invalid or unconstitutional, but also provides prevailing taxpayers in *unclear* cases with a statutory right to attorney fees and costs. *See, e.g., Waterbury v. Department of Revenue*, 11 Or. Tax 314 (1989) (ordering full refunds of personal income tax with full statutory interest under Oregon's ombnibus refund statute, together with attorney fees for taxes unconstiutionally imposed in violation of the doctrine of intergovernmental tax immunity).

In *Reich*, this Court made clear that the dispositive test under the Fourteenth Amendemnt is what a "reasonable taxpayer would have thought" at the time the taxes were paid. *Reich*, 115 S. Ct. at 550. In light of the 60 years of unbroken precedent, respondent's settled practice establishing the taxpayer's right to a refund of taxes invalidly imposed under Chapter 316 of the Oregon Statutes—the Oregon Personal Income Tax Act, and the express provisions of Or. Rev. Stat. § 305.270 providing for the refund of taxes imposed under "Chapter 316" (App. E at 33a), the "average", "reasonable" Oregon taxpayer would have thought that he was entitled to the refund remedy under Or. Rev. Stat. § 305.270. *Id.* at 550.[13] The reasonableness of such taxpayer belief is in-

[13] The tax upon the petitioners' pension was imposed under Chapter 316 of the Oregon Revised Statutes—the Oregon Personal Income Tax Act.

controvertible in light of the Oregon Supreme Court's contemporaneous decision in *Borg, supra,* applying *Davis* in ordering such refunds.

In addition, if no such remedy existed as now claimed by the respondent, then the respondent's *pre-1992* conduct is inexplicable. Certainly, if the refund remedy had been limited as held below, one would expect that the respondent's regulations, forms, annual instructions and press releases would have delineated the limitation of the Oregon refund remedy for the citizens of Oregon. However, no such limitation or distinction was ever noted by the respondent, let alone promulgated to the taxpayers of Oregon. Indeed, consistent with settled practice and precedent, the respondent, in carrying out its statutory duty to prescribe the form and procedure for perfecting refund claims, has prescribed one form and one procedure —that under Or. Rev. Stat. § 305.270 and 314.415.[14]

The game of "'*bait and switch*'" affirmed below is indistinguishable from Georgia's "'bait and switch'" in *Reich*. *Reich*, 115 S. Ct. at 548. Just as in *Reich*, in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), the respondent successfully opposed the taxpayers' claims for relief under 42 U.S.C. § 1983 and state law by asserting that federal retirees had an adequate state remedy and that by pursuing the administrative process, the Oregon Department of Revenue could give the taxpayers all the relief that the taxpayers claimed they were entitled to.[15] The remedy which the State then asserted provided that relief was

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[14] Under Oregon's Taxpayer Bill of Rights, the respondent's director is required to prepare, *inter alia*, a statement which sets forth in simple nontechnical terms the procedures for taxpayers to follow to perfect refund claims. *See* Or. Rev. Stat. § 305.860(c).

[15] Just as in *Nutbrown*, in the wake of *Davis*, Georgia federal retirees were denied judicial relief because "the [Georgia] refund statute provides an adequate remedy for any vestigial disparity." *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989).

Oregon's omnibus refund provisions—Or. Rev. Stat. §§ 305.220, 305.222, 305.270 and 305.415. *See, e.g.*, Respondent's Brief in *Nutbrown v. Munn*, SC S36652 at 27 n.15.[16] The Oregon Supreme Court agreed: "[B]ut the Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system." *Nutbrown*, 311 Or. at 345 (emphasis in the original). The relief sought by federal retirees in *Nutbrown* and which the Supreme Court of Oregon held was available to them was refunds and interest under Oregon's omnibus refund provisions—Or. Rev. Stat. §§ 305.270 and 314.415. In the decision below, the same court has now held that the very remedy central to its holding of an adequate state remedy in *Nutbrown* never existed.

Similarly, in successfully opposing the taxpayers' petition for writ of certiorari before this Court in *Nutbrown*, the respondent likewise argued that Oregon's omnibus refund remedy under *"O.R.S. Sections 305.220, 305.222, 305.270 and 314.415"* provided the federal retiree taxpayers with an adequate state remedy. *See* Respondent's Brief in Opposition in *Nutbrown v. Munn*, No. 91-457 at 13.[17]

In denying the petitioner relief in this case, the Oregon Supreme Court relied on its post-*Nutbrown*, but pre-*Harper, Davis*-related decision in *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992).[18] In *Ragsdale*, the Oregon Supreme Court, ignoring 60 years of its own precedent (the unambiguous provisions of Or. Rev. Stat. § 305.270 expressly providing for refunds of

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[16] The relevant excerpt from the respondent's Oregon Supreme Court brief in *Nutbrown* appears in Appendix G, 47a.

[17] The relevant excerpt of the Respondent's Brief in Opposition before this Court in *Nutbrown* appears in Appendix H, 48a.

[18] The petitioner was not a party in the *Ragsdale* case. Unfortunately, Mrs. Ragsdale did not seek review from this Court.

all taxes imposed under "Chapter 316"), employed the very artifice used by the Georgia Supreme Court in *Reich I* to avoid its obligation under the due process clause to provide federal retiree refunds. As in *Reich I*, the Oregon Supreme Court explained that it was construing the refund statute not to apply to "authorize refunds of taxes collected pursuant to *invalidated laws.*" *Ragsdale*, 823 P.2d at 975 (emphasis added). In *Reich*, the "Georgia high court explained that it was construing the refund statute not to apply to 'the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise *invalid.*'" *Reich*, 115 S. Ct. at 549 (citation omitted) (emphasis added). But, just as in *Reich*, here the "'denial by a state court of a recovery of taxes exacted [from the petitioner] in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment . . . .'" *Id.*

The *novelty* of the Oregon court's unseemly decision in *Ragsdale*, replicated here, is readily exposed. The court below was only able to reach the result urged by the respondent by ignoring the express provisions of Or. Rev. Stat. § 305.270 which provides the refund right for *all* taxes under "Chapter 316." Additionally, the Court below omitted from its reading of Or. Rev. Stat. § 305.765 —the express limitation—that this statute only applies *"if there is no other statute authorizing refund thereof."* In so doing, the court not only ignored its own precedent, but also failed to adhere to Oregon's rules of statutory construction. *See, e.g.*, Or. Rev. Stat. § 174.010. (App. E, 41a). *See also Burlington N. Ry. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987) (adoption of the court's view "would require amendment rather than construction of the statute[s] and it must be rejected here."). However, by so ruling, the court was thereby able to deny full retroactive effect to *Davis* and limit relief to taxes first returnable in and after April, 1989.

There is not a single case prior to *Ragsdale* which supports or holds that the Oregon omnibus refund provisions under the Oregon Personal Income Tax Act are so limited. In addition, historical practice and interpretation contemporaneous with the adoption of Oregon's modern Personal Income Tax Act do not support the respondent's revisionist history adopted by the court below. *See* 19 Op. Att'y Gen. 577 (1940) (establishing that the respondent's proffered historical rationale for its new position adopted by the court in *Ragsdale* simply is not so). (App. F, 43a).

In addition, it is indisputable that this result oriented decision cannot be sustained as " 'clear and certain.' " *Reich*, 115 S. Ct. at 440. First, prior to *1992* there was no provision for how one "instituted" the "action" to invoke Oregon's new specially reconfigured remedial scheme. The respondent's administrative process under the Personal Income Tax Act, even without manipulation, precludes commencement of an "action" until after the year in which the tax is paid. *Ragsdale*, 823 P.2d at 976-77. Indeed, the court below was only able to overcome this obstacle by again rewriting the language of the statute specifying the commencement of an "action" by substituting therefor the filing of a refund claim. Second, it is unclear what refund claims are subject to the reconfigured scheme. In denying federal retirees the relief of the general omnibus refund statute in *Ragsdale*, the court below expressly rejected the respondent's "contention that the general refund statutes are *now* necessarily limited to correcting errors in calculation or legal interpretation." *Id.*, at 975-76 n.8. Obviously, then, the general refund statutes continue as the post-deprivation scheme for some Oregon income taxes declared invalid; however, by the court's " 'bait and switch' ", this post-deprivation scheme has a special unstated exception which excludes federal retirees enforcing their rights under *Davis*. Finally, the court's use of the phrase "*are now*," *Id.* at 976, tellingly reveals the court's own acknowledgment that *Ragsdale*

reconfigured Oregon's "*scheme*, unfairly, in midcourse." *Reich*, 115 S. Ct. at 550.

Contrary to the decision below, the State's dramatic *1992* reversal of position adopted in *Ragsdale* with respect to Oregon's postdeprivation remedy is precisely the type of " '[n]ovelty in procedural requirements,' " *Reich*, 115 S. Ct. at 551, which was condemned by this Court in *Reich*.[19] The claims of the court below that it was not engaging in a " 'bait and switch' " and that its decision was not "novel" cannot withstand scrutiny. *See, e.g., Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989) (applying *Davis* to order refunds of taxes and interest collected pursuant to invalidated tax laws).

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[19] Indeed, the Oregon Supreme Court's *novelty* in adopting the respondent's reversal of position as the holding of this case underscores that the result below was designed "to thwart review in this Court." *Reich*, 115 S. Ct. at 551. Under Oregon law, no party is permitted to assert a reversal of position, let alone prevail as the respondent has here on its reversal of position with respect to the state remedy available to federal retirees. As a matter of Oregon law, the respondent was bound by its position in *Lutbrown*. *See Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 613, 892 P.2d 683 (1995) ("The harm to the judicial system that arises from allowing a party in a later judicial proceeding to contradict the position successfully taken in a earlier judicial proceeding arises whether or not there is any detrimental reliance by another party."). *See also In re Matter of Cassidy*, 892 F.2d 637 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted. Moreover, because the opinion below is in irreconcilable conflict with *Reich* and *Harper*, this Court should summarily reverse. *See, e.g., El Vocero de Puerto Rico v. Puerto Rico*, 113 S. Ct. 2004, 2006 (1993) (granting petition for certiorari and reversing judgment below); *United States v. Nachtigal*, 113 S. Ct. 1072, 1074 (1993) (same).

Respectfully submitted,

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August 18, 1995

APPENDIX A

Filed: April 6, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

(OTC 3469; SC S41438)

WILLIAM T. ATKINS,
Appellant,

and

SUSAN A. ATKINS,
Plaintiff,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Respondent.

In Banc

On appeal from the Oregon Tax Court.*

Carl N. Byers, Judge.

Argued and submitted December 8, 1994; resubmitted December 19, 1994.

GILLETTE, J.

In this direct appeal from the Oregon Tax Court, taxpayers challenge a judgment that denied their claim for tax refunds of certain state income taxes. Those taxes, paid on their federal retirement income in 1986 and 1987, were assessed in violation of the constitutional doc-

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* 12 OTR 65 (1994).

trine of integovernmental tax immunity.[1] The Tax Court held that, under ORS 305.765,[2] taxpayers are entitled to a refund of taxes assessed and paid on their federal retirement income in or after 1988, but not before that year. *Atkins v. Dept. of Rev.*, 13 OTR 65, 67-68 (1994).

Taxpayers seek a reversal of the judgment of the Tax Court. Specifically, they seek a refund, not under ORS 305.765, but rather under Oregon's omnibus tax refund statute, ORS 305.270.[3] However, this court in *Ragsdale*

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[1] During the tax years in question, Oregon impermissibly taxed the retirement income of federal retirees while it exempted state retirees from paying tax on their state retirement income. In 1989, the Supreme Court of the United States held that a similar tax scheme violated the doctrine of intergovernmental tax immunity. *See Davis v. Michigan Department of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989) (holding Michigan tax scheme unconstitutional). Oregon's tax scheme later was challenged in *Ragsdale v. Dept. of Rev.*, 312 Or 529, 823 P2d 971 (1992), in which this court held:

> "Because federal retirement benefits were subject only to a limited exemption from state tax while state retirement benefits were completely exempt, ORS 316.680(1)(c) and (d) (1987) impermissibly discriminated against employees of the federal government in violation of the constitutional doctrine of intergovernmental tax immunity."

312 Or at 542 (citation omitted).

[2] ORS 305.765 provides:

> "Whenever, in a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort holds the law of any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or the part thereof affected, has expired, and if there is no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to 305.785."

[3] ORS 305.270 provides in part:

v. Dept. of Rev., 312 Or 529, 535-37, 823 P2d 971 (1992), held that ORS 305.765 governs refunds of taxes collected under laws later adjudged invalid. Under ORS 305.765, taxpayers are entitled to a refund of taxes "collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted." *See also* ORS 305.780.[4] The "action attacking the validity" of the tax

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"(1) Except as provided in ORS 118.100, if the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed under ORS chapter * * * 316 * * * or collected pursuant to ORS 305.620, or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415."

"(2) * * * The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes imposed under ORS chapter[] * * * 316 * * *, or collected pursuant to ORS 305.620 (except where any applicable ordinance specifies another period) * * *."

ORS 314.415(1)(b) provides:

"No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions, of the return in respect to which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year. If the tax owed after offsets for all amounts owed the state is less than $5, no refund shall be made."

[4] ORS 305.780 provides:

"Nothing contained in ORS 305.770 to 305.785 authorizes the refunding of any tax collected and paid under an invali-

scheme at issue was "instituted" in 1989. *Ragsdale*, 312 Or at 539. Therefore, under *Ragsdale*, taxpayers are entitled to a refund only of taxes invalidly assessed and collected "in or after" 1988. *Ibid.* The Tax Court provided that precise remedy to taxpayers. For the reasons that follow, we affirm that decision.

FACTS

Taxpayers are husband and wife. William Atkins, a federal retiree, became an Oregon resident in 1986. Susan Atkins remained a California resident during the years relevant to this appeal. In 1987, William filed an Oregon tax return disclosing his federal retirement income received in 1986. In 1988, taxpayers filed a joint, nonresident return on their 1987 income. The 1987 return reported only one-half of William Atkins' federal retirement income on the theory that, under California's community property law, one-half of that retirement income belonged to his wife. In 1991, after the Supreme Court of the United States issued its opinion in *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989), but before this Court's ruling in *Ragsdale*, the Atkins' 1987, 1988, and 1989 tax returns were audited in Oregon and California. The Oregon Department of Revenue (the Department) noted that William Atkins' federal retirement income was not California "community property" and should have been reported in full on his Oregon tax returns. On March 24, 1991, taxpayers filed an amended 1987 Oregon tax return, which claimed that, under *Davis*, none of William's federal retirement income received in 1987 was subject to tax in Oregon. The Department audited the amended return and, in January of 1992, issued a notice of assessment of additional tax for the excluded federal retire-

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dated tax law, or invalidated part thereof, where the tax as provided in such law became due and payable in any year prior to the year in which the suit or action seeking the invalidation of the law or part thereof was instituted."

ment income. Taxpayers voluntarily paid the assessment to avoid accrual of interest and then appealed the assessment to the Department. The Department denied taxpayers' claim for refund on July 9, 1993. Taxpayers appealed to the Oregon Tax Court, which held that the taxes included on taxpayers' 1987 return (on one-half of their federal retirement income) could not be refunded. The additional taxes, paid in response to the 1992 assessment by the Department, were refunded. Taxpayers sought direct review of the Tax Court judgment in this court.

DISCUSSION

Taxpayers make two different claims for refund. Their dispute with the Department always has concerned the refund of taxes reported in their 1987 joint tax return. That was the dispute litigated below at the Department and in the Tax Court. In this court, taxpayers now claim, for what appears to be the first time, that they are entitled to a refund of taxes paid by William Atkins for *1986*. That claim is not properly before this court, and we do not address it.[5] The sole issue properly before us is whether taxpayers are entitled to a refund of taxes paid on the portion of William Atkins' federal retirement income reported as income in 1987. We now turn to that issue.

Taxpayers argue that this court's decision in *Ragsdale* fails to provide them with the full retroactive application of *Davis* required by *Harper v. Virginia Dept. of Taxation*, 509 US ——, 113 S Ct 2510, 125 L Ed 2d 74 (1993) (pertaining to a Virginia tax scheme). Taxpayers also assert that Oregon's tax refund statutes, as

[5] By our estimation, nearly eight years have passed since taxpayers filed their 1986 tax return, and never before have they asserted this claim for refund. On review of taxpayers' claims, this court is not a court of first impression. Taxpayers cannot avoid the exhaustion of their administrative remedies merely because they are before this court on another matter. *See Nutbrown v. Munn*, 311 Or 328, 811 P2d 131 (1991) (administrative remedies must be exhausted).

construed by this Court, deny them a "clear and certain remedy" that will meet federal due process requirements. *See McKesson Corp v. Florida Alcohol & Tobacco Div.*, 496 US 18, 110 S Ct 2238, 110 L Ed 2d 17 (1990) (setting out federal due process requirements in this context). Taxpayers also argue that, in *Ragsdale*, this court impermissibly construed ORS 305.765 to deny them the benefit of the three-year statute of limitations for refunds of "excess" taxes that is provided in ORS 305.270 and 314.415(1)(b). *See Reich v. Collins*, 513 US ——, 115 S Ct 547, 130 L Ed 2d 454 (1994) (holding that State of Georgia could not hold out what plainly appeared to be a clear and certain post-deprivation remedy and then declare, only after disputed taxes were paid, that no such remedy existed).

We shall discuss taxpayers' arguments in three parts. In part one, we discuss whether Oregon statutes provide a "clear and certain" remedy for taxes paid pursuant to a law later held invalid and, if so, what that remedy requires. In part two, we assess taxpayers' argument that *Davis* and *Harper* require full retroactive payment of all taxes. In part three, we focus on the due process requirements of *McKesson* and *Reich*, to determine whether ORS 305.765 and our holding in *Ragsdale* violate those requirements.

I. OREGON'S REMEDY

Oregon provides, by statute, a special form of tax refund for taxes assessed and collected pursuant to a tax law that is later invalidated. That statute has particular time limits. The impetus for that refund remedy came in 1930, when Oregon's "intangibles tax" was declared unconstitutional by this court. *See Redfield et al. v. Fisher et al.*, 135 Or 180, 204, 292 P 813 (1930), *reh den*, 135 Or 205, 295 P 461 (1931) (so holding). In 1931, the Oregon legislature enacted what is now ORS 305.765 through 305.785. In *Ragsdale*, 312 Or at 536-37, this court interpreted ORS 305.765 and held that—in the absence of a more specific statute relating to the

challenge, invalidation, and refund of taxes paid pursuant to a law later held invalid—the legislature intended ORS 305.765 to apply. The context of the statute, including related statutes enacted by the same legislature, demonstrated that legislative intent. *Ibid.*; *see PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (discussing methodology for interpretation of statutes). Because taxpayers later challenge that interpretation on federal due process grounds, see part III, *post*, we explain, once again, that interpretation here.

In 1929, just before the great stock market crash, Oregon enacted two new tax provisions. The first provision, artfully titled the "Property Tax Relief Act of 1929," established Oregon's first income tax. Or Laws 1929, ch 448. The second provision taxed "intangibles," including gross interest or dividends, other than stock dividends, derived from "bonds, notes, claims and demands, secured or unsecured * * *, all shares of stock in corporations and any and all other evidences of indebtedness." Or Laws 1929, ch 429, § 1. Both tax acts included provisions for refunds of "excess" taxes paid, Or Laws 1929, ch 448, § 21 (income tax); Or Laws 1929, ch 429, § 10 (intangibles tax), and both authorized the State Tax Commission to use limited amounts of the generated tax revenue for that purpose.

The "intangibles tax" almost immediately was challenged and was struck down in *Redfield*, in which this court held that the intangibles tax violated the Fourteenth Amendment to the Constitution of the United States. 135 Or at 204. Within a matter of weeks after this court announced its *Redfield* decision, the State Tax Commission requested two opinions from the Oregon Attorney General. The first request asked "whether refunds [could] be made by any of the present state officials either out of funds which have been receipted into the general fund or which have been held by the Treasurer unreceipted, and, if so, by whom, and, if not, what legal steps [were] required in order to authorize the making of refunds." 15

Op Att'y Gen 34 (Or 1930-32). The second request asked whether the *Redfield* decision had struck down the refund provision of the intangible tax act or whether, instead, that provision could be used to refund the taxes collected unconstitutionally. 15 Op Att'y Gen 37 (Or 1930-32).

The opinions given by the Attorney General, in response to those two questions, set the stage for the legislative action that followed. The first opinion distinguished between the refund of a tax later held invalid and the refund of an "overpayment" of a tax. In the Attorney General's view, a refund of a tax, voluntarily paid pursuant to a law later held invalid, could not be made under then-existing Oregon law without specific authorization.

> " '[T]axes voluntarily paid cannot be recovered, and, in the absence of statute, * * * the payment of illegal taxes "under protest" does not make the payment involuntary so as to authorize the taxpayer to recover the taxes so paid.' "

15 Op Att'y Gen 35 (Or 1930-32) (quoting *Johnson v. Crook County*, 53 Or 329, 334-35, 100 P 294 (1909), and cases cited therein). *See also Moffitt v. Salem*, 81 Or. 686, 691, 160 P 1152 (1916) (stating rule); 10 Op Att'y Gen 167 (Or 1920-22) (stating rule and noting cases). The Attorney General concluded that taxes collected under the "intangibles tax" before it was held invalid could not be refunded without specific legislative authorization.

The second opinion of the Attorney General advised the State Tax Commission that the limited funds provided by Oregon Laws 1929, chapter 429, section 15, for refunds of "excess" taxes paid were not available to make refunds of taxes assessed and collected under mistake of law. Instead, those funds were

> "to be used in making refunds of amounts paid by taxpayers in excess of the taxes they were legally

> required to pay. Such excess was not paid under a mistake of law, but constitute[d] money paid upon condition that the amount thereof in excess of the taxes due should be refunded as soon as ascertained. Under such circumstances neither the Tax Commission nor the State of Oregon obtained any title thereto."

15 Op Att'y Gen at 38. The Attorney General again advised that the existing refund statute, and the limited fund provided for refunds of "excess taxes paid," did not authorize the refund of taxes paid "under a mistake of law." *Id.* at 37-38. This, he advised, would require legislative authorization. That authorization soon followed.

In 1931, the legislature enacted three statutes relevant to this appeal. The first was an omnibus refund provision, which authorized the State Tax Commission to draw directly from the general fund to pay refunds of taxes "in excess of those due or legally assessable." It provided as follows:

> "Section 1. Whenever it shall appear to the state tax commission from the audit of the returns required by any revenue measure, or otherwise, that the taxes, penalty or interest paid by a taxpayer or any part thereof, are in excess of those due or legally assessable, the commission is hereby authorized to refund to any taxpayer who has paid the tax, all taxes, interest or penalties in excess of those due or legally assessable, with interest at the rate of 6 per cent per annum from and after 30 days from the date of filing claim for refund.
>
> "Section 2. That in lieu of the procedure provided in certain of the revenue acts for the retaining of a working balance by the commission from which refunds may be made, the commission is hereby authorized, in accordance with the requirement of the secretary of state, to pay over all funds received

> under any of the revenue acts, to the state treasurer, and to write refund checks upon the state treasurer for refunds authorized by law."

Or Laws 1931, ch. 229. That statute forms the basis for our present omnibus refund statute, ORS 305.270.

Later, during the same legislative session, the legislature enacted two companion statutes that specifically authorized, and limited, refunds of taxes collected pursuant to the "intangibles tax" and any future tax that was held to be invalid. Oregon Laws 1931, chapter 338, dealt specifically with the "intangibles tax" refund. It appropriated an amount to be used for repayment of the tax and directed the Tax Commission to prepare a report of all taxpayers who had paid it. The statute then directed the Secretary of State to audit the State Tax Commission's report before forwarding it to the State Treasurer for payment. If and when the Supreme Court of the United States denied the state's petition for certiorari, or affirmed the judgment of this court, the Treasurer was authorized to pay the refunds. This elaborate refund scheme was repeated in Oregon Laws 1931, chapter 337, which also provided in part:

> "Whenever, in any proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the state treasury, the court of last resort shall have held said law or any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or the part thereof affected, shall have expired, and in case there be no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner herein provided."

That latter provision now is codified as ORS 305.765.[6]

Having provided the historical context of the relevant statutes, we now turn to resolution of taxpayers' arguments. Taxpayers rely on the phrase "and if there is no other statute authorizing refund thereof," in ORS 305.765, to argue that Oregon's current omnibus tax refund statute, with its longer statute of limitations, should apply. We do not agree. As this court noted in *Ragsdale*, the intent of the legislature is clear from the fact that the legislature found it necessary to enact all the above-mentioned statutes in the same legislative session. If the legislature had intended the 1931 omnibus refund statute to apply to *all* tax refunds, including refunds of taxes paid pursuant to laws later held to be invalid, it would not have enacted Oregon Laws 1931, chapter 337 or 338. A construction of the 1931 omnibus tax refund statute to make that law applicable to *all* refunds also would have contradicted the Attorney General's contemporaneous opinion that "refunds of amounts paid by taxpayers in excess of the taxes they were legally required to pay" were *not the same* as refunds of taxes paid pursuant to a law later held invalid.[7] We explained in *Ragsdale* that, if the 1931 provision for *future* refunds of taxes paid pursuant to laws later held invalid, Oregon Laws 1931, chapter 337, were to have *any* effect at the time it was enacted, the legislature could not have intended it to be overshadowed by

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[6] In the 1953 revision and recodification of Oregon's statutes, the phrase "and in case there be no other statute authorizing refund thereof" was changed to "and if there is no other statute authorizing refund thereof." *Compare* OCLA 110-859 (1931) *with* (*former*) ORS 306.280 (1953). The change in wording became law by authority of ORS 174.510 (1953) (adopting revised statutes as presented in enrolled House Bill No. 2). We find nothing in that stylistic change suggesting a change in the meaning of the phrase.

[7] We do not hold that the legislative intent of the omnibus tax refund statute passed in 1931 is dependent on the Attorney General's opinion addressing refunds. We merely note that the state's chief legal officer used the quoted phrase to refer to refunds of *excess* taxes, and not refunds of *invalidated* taxes.

the earlier enacted omnibus refund statute of that same year. It has long been the rule of this court that " 'statutes on the same subject * * * particularly if passed at the same [legislative] session, should receive a construction, if possible, which will give effect to each of them.' " *Ragsdale,* 312 Or at 537 (quoting *Daly v. Horsefly Irrigation District,* 143 Or 441, 446, 21 P2d 787 (1933)).

It is clear from the context of ORS 305.765, as illustrated above, that the phrase on which taxpayers rely originally referred to the *more specific* refund provisions in Oregon Laws 1931, chapter 338, and not the omnibus refund statute enacted as Oregon Laws 1931, chapter 229. We once again hold that, consistent with the clear intent of the legislature, the more specific provisions of ORS 305.765, rather than the more general provision of ORS 305.270, control eligibility for refunds of the kind sought by taxpayers here.

Having reaffirmed our earlier analysis in *Ragsdale,* we now turn to the requirements and limitations imposed by ORS 305.765. To receive a refund under that statute, the invalid state law first must be "attacked" in an "action" and held "invalid" by this court. Once the "time limited for any further proceeding to sustain the validity of the law * * * has expired," refunds can be made. The refund, however, is limited to "all taxes collected and paid under the law or part thereof invalidated, *in or after the year in which the action attacking the validity of the same was instituted.*" ORS 305.765 (emphasis supplied). That limitation is further asserted in ORS 305.780 ("Nothing contained in ORS 305.770 to 305.785 authorizes the refund [of invalidated taxes] due and payable in any year prior to the year in which the suit or action seeking the invalidation of the law or part thereof was instituted"). We turn now to taxpayers' argument that, the Oregon refund statutes notwithstanding, full retroactive payment of *all* invalidly collected taxes is required by *Davis* or *Harper.*

II. RETROACTIVE PAYMENT OF INVALID TAXES

In *Davis*, the Supreme Court of the United States did not discuss the retroactivity question. It merely held: "The State having conceded that a refund is appropriate in these circumstances, to the extent *appellant* has paid taxes pursuant to this invalid tax scheme, *he* is entitled to a refund." 489 US at 817, 109 S Ct at 1509, 103 L Ed 2d at 906 (citations omitted; emphasis supplied). Retroactivity was not discussed specifically until *Harper*.

In *Harper*, the Supreme Court of Virginia had refused to apply the *Davis* decision to a case pending in Virginia at the time *Davis* was decided. The Supreme Court of the United States reversed the judgment of the Supreme Court of Virginia and remanded the case for the determination of a proper remedy. The Court held that, when the Court applies a federal rule of law to the parties before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 US at ——, 113 S Ct. at 2517, 125 L Ed 2d at 86. It further held:

> "Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' [*McKesson*, 496 US] at 51-52, 110 L Ed 2d 17, 110 S Ct 2238. State law may provide relief beyond the demands of federal due process, id., at 52, n 36, 110 L Ed 2d 17, 110 S Ct 2238, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 L Ed 2d 17, 110 S Ct 2238."

509 US at ——, 113 S Ct at 2520, 125 L Ed 2d at 89.

Neither *Davis* nor *Harper* required full retroactive payment of all invalidly collected taxes. Both merely re-

quired retroactive application of the *Davis* decision to all cases *pending* in state courts at the time that *Davis* was decided—a circumstance not present here. *Harper* further required that the state's chosen remedy meet the minimum standards of federal due process that are set out in *McKesson*. We turn now to those requirements.

III. THE DUE PROCESS REQUIREMENTS OF *McKESSON* AND *REICH*

In *McKesson*, 496 US at 37-39, 110 S Ct at 2250-51, 110 L Ed 2d at 36-37, the Supreme Court of the United States described the minimum due process requirements in tax cases as follows:

> [W]hereas '[w]e have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest," ' it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.
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> "* * * To satisfy the requirements of the Due Process Clause, therefore, [in a post-deprivation refund action] the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a

> 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."

(Emphasis in original; citations and footnotes omitted).

There is no question that Oregon's statutes encourage payment of a tax before litigation of a claim for relief. *See* ORS 305.419 (tax, interest, and all penalties assessed shall be paid on or before the filing of a complaint with the regular division of the Tax Court). Taxpayers do not challenge the sufficiency of the post-deprivation process afforded to them. They claim, rather, that ORS 305.765 does not provide a "clear and certain remedy" such that "the opportunity to contest the tax is a meaningful one." *McKesson*, 496 US at 39, 110 S Ct at 2251, 110 L Ed 2d at 37.

In *McKesson*, the Supreme Court of the United States spoke directly to the State of Florida's ability to limit its refund remedy and engage in sound fiscal planning. It held:

> "A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other acocunting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices

> to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax."

496 US at 45, 110 S Ct at 2254-55, 110 L Ed 2d at 41.

Oregon, through enactment of ORS 305.765, created such "procedural protections" to ensure stable fiscal planning long ago. As we have already set out, ORS 305.765 requires an early protest before a refund of taxes collected under an invalid law is available. That requirement, in *McKesson* terms, acts as a "relatively short statute[] of limitations." 496 US at 45, 110 S Ct at 2254, 110 L Ed 2d at 41. If an action attacking the validity of the tax is not instituted within the year following its assessment (*viz.*, the year in which it is due and payable in this case), no refund may be made. Furthermore, the "action" requirement in ORS 305.765 permits the state to prepare for the possibility that refunds of taxes, collected under the challenged tax scheme, might be necessary. That is exactly what the Supreme Court of the United States contemplated when it suggested that a state "place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds." *McKesson*, 496 US at 45, 100 S Ct at 2255, 110 L Ed 2d at 41.

It follows that, contrary to taxpayers' claims, the *McKesson* court considered, and approved, limitations on refunds of taxes paid pursuant to a law later held invalid. ORS 305.765 established such limitations in 1931. Consistent with that statute, Oregon provided refunds to taxpayers taxed under the invalid tax scheme back to 1988, the tax year preceding the year in which the initial tax challenge was made. Taxpayers now seek a refund of taxes paid two years before any attack or challenge was made. That claim is barred by the limitations that Oregon has placed on such refunds.

We turn now to taxpayers' final argument on review. Taxpayers argue that the Supreme Court's decision in *Reich* requires this court to apply ORS 305.270, the general tax refund statute, rather than ORS 305.765, to their claim. We do not agree. The *Reich* case involved the State of Georgia, a state that did not make special provision for refunds of taxes paid pursuant to a law later held invalid. Instead, Georgia had only one refund statute, Ga Code Ann § 48-2-35(a) (Supp 1994), which provided in part:

> "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner."

In the *Reich* case, the Georgia Supreme Court had held, without further explanation, that the statute

> "contemplate[d] the situation where a taxing authority erroneously or illegally assesses and collects a tax under a valid law. It [did] not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid."

Reich v. Collins, 262 Ga. 625, 628-29, 422 SE2d 846, 849 (1992). Accordingly, the Georgia court denied the taxpayers all post-deprivation remedies.

The Supreme Court of the United States took a different view. It held that, although a state's remedial scheme was "generally a matter only of state law," a state could not "reconfigure its scheme, unfairly, in *midcourse*—to 'bait and switch,' as some have described it." Accordingly, it reversed the Georgia court's decision. *Reich*,

513 US at ——, 115 S Ct at 550, 130 L Ed 2d at 459 (emphasis in original).

Unlike Georgia, Oregon has not "reconfigured" its scheme or changed it in midcourse. The applicable statute has been the law of this state since 1931. Neither has this court introduced "novel" procedural requirements to "thwart review," such as those that the Supreme Court of the United States found to have been created in *Reich*. *Reich*, 513 US at ——, 115 S Ct at 551, 130 L Ed 2d at 460. To the contrary, neither the controlling statute, nor our method of statutory construction, is "novel." We do not read *Reich* to require this court to abandon its longstanding rules of statutory construction in order to provide taxpayers a refund to which they would not normally be entitled. That *would be* novel.

Taxpayers have not demonstrated any reason for this court to overrule *Ragsdale*, and we adhere to it. Under that decision, taxpayers are not entitled to a refund of taxes invalidly collected before the 1988 tax year. Thus, taxpayers' claim for refund of taxes paid in 1987 must fail.

The judgment of the Tax Court is affirmed.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

SC S41438
CA 3469

WILLIAM T. ATKINS,
Plaintiff/Appellant

SUSAN ATKINS,
Plaintiff

v.

DEPARTMENT OF REVENUE
Defendant/Respondent

ORDER DENYING RECONSIDERATION

The court has considered the Petition for Reconsideration and orders that it be denied.

DATE: May 23, 1995

/s/ Wallace P. Carson, Jr.
WALLACE P. CARSON, JR.
Chief Justice

APPENDIX C

[Filed May 4, 1994]

IN THE OREGON TAX COURT

Income Tax

No. 3469

WILLIAM T. and SUSAN A. ATKINS,
Plaintiffs,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant.

SECOND CORRECTED ORDER

This matter is before the court on cross-motions for summary judgment. There is no dispute of material fact.[1] The motions raise issues with regard to the effect of *Harper v. Virginia Dept. of Taxation,* 509 US ——, 113 S Ct 2510, 125 L Ed 2d 74, (1993), on Oregon's income tax laws.

FACTS

Plantiffs are husband and wife. In 1987 husband was a resident of Oregon and wife was a resident of California. They filed a joint nonresident 1987 Oregon income tax return. The return excluded one-half of husband's federal retirement income on the theory that, under California community property law, one-half of the in-

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[1] The facts are taken from the pleadings and memoranda filed by the parties.

come belonged to wife.[2] Plaintiffs later concluded that none of their 1987 federal retirement income should have been subjected to taxation by Oregon and filed an amended 1987 return.[3] Defendant audited the return and, in January 1992, issued a notice of assessment of additional tax for the excluded federal retirement income. Although plaintiffs paid the assessment to avoid the accrual of interest, they appealed the assessment to defendant.[4] On July 9, 1993, defendant issued its Opinion and Order No. 92-5105 denying plaintiffs a refund for 1987.

A brief review of the case law will be helpful in understanding the issues raised in this appeal.

UNCONSTITUTIONAL DISCRIMINATION

In 1989, the United States Supreme Court held that a state law imposing a tax on federal retirement income, but exempting state retirement income, violated 4 USC § 111 and the constitutional doctrine of intergovernmental immunity incorporated therein. *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989).[5] The decision leaves the state with the responsibility of resolving the discrimination. 489 US at 817-18.

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[2] Plaintiffs acknowledge in their rebuttal brief that they relied on erroneous advice of the California Franchise Tax Board and a California attorney.

[3] The amended return served as a claim for refund of all taxes attributable to plaintiffs' 1987 federal retirement income. *See* ORS 305.270(2).

[4] Defendant must have also assessed deficiencies due to excluded federal retirement income for 1988 and 1989, because plaintiffs appealed assessments for those years. Their appeal of 1988 and 1989 was rendered moot when defendant refunded the taxes for those years in accordance with *Ragsdale v. Dept. of Rev.*, 312 Or 529, 823 P2d 971 (1992).

[5] Justice Stevens, in his dissent, indicates that at least 14 other states, including Oregon, had similar tax schemes. 489 US at 822.

Based on *Davis*, Oregon taxpayers who had paid state income tax on their federal retirement income filed written claims for refunds under ORS 305.270 and ORS 314.415.[6] In *Ragsdale v. Dept. of Revenue*, 11 OTR 440 (1990), this court acknowledged that Oregon's tax scheme came within the *Davis* ruling. 11 OTR at 443. However, after applying the tests set forth in *Chevron Oil v. Huson*, 404 US 97, 92 S Ct 349, 30 L Ed 2d 296 (1971), this court concluded that *Davis* should not be applied retroactively and denied the taxpayers' claim for refunds. The taxpayer appealed that ruling to the Oregon Supreme Court. 11 OTR at 446.

OREGON'S LIMITED REMEDY UNDER RAGSDALE

In *Ragsdale v. Dept. of Rev.*, 312 Or 529, 823 P2d 971 (1992), the supreme court held that, regardless of any theory of retroactivity under federal law, ORS 305.765 to 305.785 required a "measure" of retroactivity. 312 Or at 534. ORS 305.765 provides:

> "Whenever, in a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort

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[6] The relevant portions of the refund claim statutes provides:

"[I]f the amount of the tax shown as due on a report or return * * * is less than the amount theretofore paid, or if a person files a claim for refund * * * any excess tax paid shall be refunded by the department with interest * * *.

"The claim shall be made on a form prescribed by the department, except that an amended report or return showing a refund due * * * shall constitute a claim for refund." ORS 305.270(1) and (2).

"No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed * * * in compliance with ORS 305.270, * * *." ORS 314.415(1)(b).

> holds the law or any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or the part thereof affected, has expired, *and if there is no other statute authorizing refund thereof,* all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to ORS 305.785." (Emphasis added.)

Separate and apart from the issue of retroactivity is the issue of remedies. The *Ragsdale* court decided that ORS 305.765 through ORS 305.785 provide the exclusive remedy for refund of taxes paid under an invalidated state law. 312 Or at 537. In reconciling the statutes, the court viewed ORS 305.270 and ORS 314.415 as general refund provisions which did not apply in the face of the specific provisions of ORS 305.765. *Id.* The court interpreted the phrase "and there is no other statute authorizing refund thereof" to mean another statute "that specifically authorizes the refunding of taxes collected pursuant to laws later invalidated." 312 Or 537. This interpretation denied Oregon taxpayers refunds for any years prior to 1988.

EFFECT OF HARPER

In *Harper v. Virginia Dept. of Taxation,* 509 US ——, 113 S Ct 2510, 125 L Ed 2d 74 (1993), the United States Supreme Court held that the ruling in *Davis* was to be applied retroactively. *Harper* involved a Virginia income tax scheme similar to Oregon's and similar to the one in *Davis.* The Virginia Supreme Court acknowledged that Virginia's income tax laws violated the doctrine of intergovernmental immunity but denied that *Davis* should be applied retroactively. In *Harper,* the United States Supreme Court reversed the Virginia Supreme Court, announcing:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 113 S Ct at 2517, 125 L Ed 2d at 86.

This pronouncement alone does not entitle plaintiffs to a refund. Although a federal ruling may be given retroactive effect, the remedies provided to taxpayers are a matter of state choice.[7] The only limitations imposed upon a state's choice of remedies is that the states must comply with federal requirements for due process.

DUE PROCESS REQUIREMENTS

The requirements of due process are set out in *McKesson v. Division of Alc. Bev.*, 496 US 18, 110 S Ct 2238, 110 L Ed 2d 17 (1990). As explained in that case, because "exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." 496 US at 36. The procedural safeguards may consist of a predeprivation hearing or clear and certain, backward-looking, postdeprivation relief. 496 US at 37.

The fundamental requirement of predeprivation due process is that the person being deprived of property must be given "the opportunity to be heard."[8] *Grannis v. Ordean*, 234 US 385, 394, 34 S Ct 779, 58 L Ed 1363 (1914).

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[7] The court in *Harper* noted:

> "[W]e reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund." *Harper* at 88.

[8] To be "heard", the person "shall have the right to support his allegations by argument however brief, and, if need be, by proof,

> "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965).

In the area of taxation the taxpayer must have "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the assessment's validity." *McKesson* 496 US at 38. Plaintiffs maintain that Oregon does not provide a constitutionally sufficient predeprivation hearing.

Under Oregon's statutory scheme, taxpayers who wish to contest an income tax assessment need not pay the tax before appealing to the Department of Revenue. If a taxpayer appeals to the Department of Revenue, the department then conducts an administrative hearing. At the hearing, the taxpayer is given an opportunity to argue, to submit proof, to be represented by counsel, and to cross-examine witnesses. This administrative adjudication is conducted by a hearings officer who makes written findings of fact and recommended conclusions. The director of the department makes the ultimate decision.[9] ORS 305.275.

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however informal." *Londoner v. Denver*, 210 US 373, 386, 28 S Ct 708, 52 L Ed 103 (1908).

"The requirement of due process is that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appeal for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed." *McGregor v. Hogan*, 263 US 234, 237, 44 S Ct 50, 68 L Ed 282 (1923) (citations omitted).

[9] Although the director is charged with the duty of administering the tax laws (ORS 305.015) and, therefore, charged with raising revenue (ORS 305.025), plaintiffs do not contend that either the director or the hearings officer is not impartial.

OREGON PROCEDURE COMPLIES WITH DUE PROCESS

Oregon's statutory scheme provides taxpayers with a predeprivation hearing consistent with the requirements of due process. Taxpayers may withhold payment and seek a determination of their liability. Although taxpayers are required to pay their income tax before appealing to the Oregon Tax Court, this is only after completion of the administrative hearing.

Even if the administrative hearing does not constitute a predeprivation hearing, Oregon statutes provide a clear and backward-looking remedy for taxpayers appealing an assessment of a tax. The appeal statutes preserve the taxpayer's right to a refund. ORS 305.419 and ORS 305.435.

TWO SEPARATE GROUNDS

Plaintiffs' claim for refund in this case requires analysis on two separate grounds. Part of the taxes which plaintiffs seek to recover were assessed after the *Davis* decision. The other part of the taxes for which plaintiffs request a refund were self-assessed when they filed their original 1987 return.

Davis declared laws like Oregon's in violation of the federal constitution. *Harper* makes it clear that the *Davis* ruling is to be given full retroactive effect. That is, once Oregon's scheme became invalid under the federal constitution, defendant may not continue to assess or collect taxes under that scheme. Consequently, *Harper* makes defendant's 1992 assessment invalid. Plaintiffs timely appealed that assessment in accordance with statutory procedures. Those procedures assure plaintiffs that, if they prevail, they are entitled to a refund of the taxes paid under the assessment. ORS 305.419. The limitations of ORS 305.780 do not apply here, because the refund is not sought in a case attacking the validity of the law. That was done in *Ragsdale*. Here, plaintiffs are con-

tending that the assessment is not valid. The court concludes that plaintiffs are entitled to a refund of all taxes and interest paid under the assessment.

The second portion of plaintiffs' claim is governed by *Ragsdale*. When the taxpayers filed their 1987 income tax return they self-assessed and paid the tax on one-half of their federal retirement. After *Davis* declared tax schemes like Oregon's invalid, plaintiffs filed a claim for refund under ORS 305.270. *Ragsdale* holds that the refund provisions of ORS 305.270 do not apply to refunds based on invalidated laws. Refunds due under invalidated laws are provided by ORS 305.765. However, plaintiffs do not qualify for a refund under ORS 305.765 because that statute provides only limited refunds. The court in *Ragsdale* held that ORS 305.765 through ORS 305.785 is the type of limited remedy which satisfies the requirements of due process. *Harper* does not change this ruling because *Harper* only addresses retroactivity, not the remedy required by due process.

The court finds plaintiffs are entitled to a refund of only those amounts paid in response to the 1992 assessment made by defendant. The self-assessed taxes paid under their original 1987 income tax return may not be refunded. Now, therefore,

IT IS HEREBY ORDERED that the Motions for Summary Judgment are granted in part and denied in part in accordance with the above decision. Plaintiffs to recover costs and disbursements.

Dated this 3rd day of May, 1994.

/s/ Carl H. Byers
Judge

APPENDIX D

[Filed June 9, 1994]

IN THE OREGON TAX COURT

Income Tax

No. 3469

WILLIAM T. ATKINS and SUSAN A. ATKINS,
Plaintiffs,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant.

JUDGMENT

Plaintiffs appealed from Department of Revenue Opinion and Order No. 92-5105, dated July 9, 1993, denying plaintiffs a refund of taxes on their 1987 federal retirement income. In accordance with this court's second corrected order of May 4, 1994;

IT IS ORDERED AND ADJUDGED as follows:

1. Defendant's assessment of additional Oregon Personal Income Tax in the total amount of $719.31 on plaintiffs' 1987 federal retirement income is void, and defendant shall refund to plaintiffs:

(a) The sum of $494.63, paid by plaintiffs on February 19, 1991;

(b) The sum of $225.64 paid, by plaintiffs on January 30, 1992;

(c) Interest on the above sums at the rate provided by ORS 305.220, from their respective payment dates until refunded.

2. Except as modified above, defendant's Opinion and Order No. 92-5150, dated July 9, 1993, is affirmed.

3. No costs are awarded.

DATED this 6th day of June 1994.

/s/ Carl H. Byers
Oregon Tax Court Judge

APPENDIX E

EXCERPTS OF RELEVANT OREGON REVISED STATUTES

305.220 Interest on deficiency, delinquency or refunds; adjustments in rates; computation. (1) unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every deficiency or delinquency arising under any law administered by the Department of Revenue shall bear simple interest at the rate of five-sixths of one percent per month or fraction thereof.

(2) Unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every refund arising under any law administered by the Department of Revenue shall:

(a) Bear interest at the rate of one percent per month, or fraction thereof, for interest periods beginning prior to June 1, 1983.

(b) Bear interest at the rate of one and one-half percent per month, or fraction thereof, for interest periods beginning on or after June 1, 1983, and prior to January 1, 1988, unless an adjustment was made under subsection (3) of this section in which case the adjusted interest rate shall be used for the period for which the adjustment was made.

(c) Subject to subsections (3) and (5) of this section and ORS 305.222, bear interest at the rate of five-sixths of one percent per month, or fraction thereof, for interest periods beginning on or after January 1, 1988.

(3)(a) If the director determines that the rates of interest for deficiencies, delinquencies and refunds established in subsections (1) and (2) of this section are at least one percentage point more or less than the prevailing rates of interest established by the Internal Revenue Service for underpayments arising under the federal tax

laws to which one percentage point has been added, the director may adopt, by rule, adjusted interest rates. The director shall not adopt adjusted interest rates more than once in a calendar year. Notice of intent to adopt adjusted interest rates shall be given in the manner provided in ORS 183.335, not less than three months before the proposed effective date of the adjusted rates.

(b) In establishing the adjusted interest rates to be adopted under this subsection:

(A) The director shall take into consideration the current interest rates established by the Internal Revenue Service for underpayments arising under the federal tax laws.

(B) To any interest amount determined by taking into consideration the current interest rates established by the Internal Revenue Service for underpayment under subparagraph (A) of this paragraph, which interest amount shall be expressed at a rate per month or fraction thereof, there shall be added one-twelfth of one percent.

(4)(a) If the director adopts an adjusted interest rate for deficiencies and delinquencies for any interest period beginning prior to June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is six percentage points below the adjusted interest rate for deficiencies and delinquencies for the same period.

(b) If the director adopts an adjusted interest rate for deficiencies and delinquencies for an interest period beginning on or after June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is equal to the adjusted interest rate for deficiencies and delinquencies.

(5) Any change in the rate of interest applicable to deficiencies, delinquencies or refunds resulting from the adoption of adjusted interest rates by the director under this section shall apply to deficiencies, delinquencies and refunds outstanding on the effective date of the rule, or

arising on or after that date, but only with respect to interest periods beginning on or after that date.

(6) If the rate of interest on a deficiency, a delinquency or a refund is governed by this section, and if a fraction of a month is involved in making the computation of interest on the deficiency, delinquency or refund, then for the fractional month, the simple interest otherwise provided shall be computed on a daily basis.

305.222 Determination of interest rate. For purposes of determining the interest rate established under ORS 305.220:

(1) In the case of a refund of tax ordered by the Oregon Tax Court or the Oregon Supreme Court and arising under any law administered by the Department of Revenue, if the refund is not paid by the department within 60 days after the date of the order, the interest rate provided under ORS 305.220 shall be one-third of percent greater than that so provided under ORS 305.220, but only with respect to interest periods that begin 60 days after that date the order is entered.

(2) In the case of a notice of assessment, or an assessment under ORS 305.265(12), pursuant to any law administered by the department, if the deficiency or delinquency is not paid within 60 days after the date of the notice of assessment or the assessment, the interest rate provided under ORS 305.220 shall be one-third of one percent greater than that so provided under ORS 305.220, but only for periods beginning after 60 days after the date of notice of assessment or assessment under ORS 305.265(12), whichever is applicable.

(3) If the deficiency or delinquency is appealed to the department or in a hardship situation to the Oregon Tax Court without prior payment of tax, then notwithstanding subsection (2) of this section; the increased rate of interest shall commence only for interest periods beginning after a 60-day period after the date that the order of the

department, the Oregon Tax Court or the Oregon Supreme Court affirming the deficiency or delinquency is entered.

305.270 Refund of excess tax paid; claim procedure. (1) Except as provided in ORS 118.100, if the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed under ORS chapter 118, 119, 308, 310, 314, 316, 317, 318 or 321, or collected pursuant to ORS 305.620, or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.

(2) The claim shall be made on a form prescribed by the department, except that an amended report or return showing a refund due and filed within the time allowed by this subsection for the filing of a claim for refund, shall constitute a claim for refund. The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes imposed under ORS chapters 310, 314, 316, 317 and 318, or collected pursuant to ORS 305.620 (except where any applicable ordinance specifies another period), within three years from the payment of the tax for taxes imposed under ORS chapter 118 or 119 and within two years of the payment of any tax under ORS chapter 308 or 321.

(3) Upon receipt of a claim for refund, or original report or return claiming a refund, the department shall either refund the amount requested or send to the claimant a notice of any proposed adjustment to the refund claim; stating the basis upon which the adjustment is made. A proposed adjustment may either increase or decrease the amount of the refund claim or result in the finding of a deficiency. If the proposed adjustment results

in a determination by the department that some amount is refundable, the department may send the claimant the adjusted amount with the notice.

(4) The claimant may, within 30 days of the date of the notice of proposed adjustment, advise the department in writing of objections to the refund adjustment and may request a conference with the department, which shall be held within one year of the date of the notice. The department shall notify the claimant of a time and place for the conference, and appoint a conference officer to meet with the claimant for an informal discussion of the claim. After the conference, the conference officer shall send to the claimant, by certified mail, a determination of the matter, and include therewith either a notice of refund denial or payment of any amount found to be refundable, together with any applicable interest provided by this section. If the conference officer determines that a deficiency exists, the officer shall include a notice of assessment with the determination.

(5) If no conference is requested, and the adjustments have not resulted in the finding of a deficiency, the following shall apply:

(a) If written objections have been made by the claimant, the department shall consider the objections, determine any issues raised and send the claimant a notice of refund denial or payment of any amount found to be refundable, together with any interest provided by this section.

(b) If no written objections are made, the notice of any proposed adjustment shall be final after the period for requesting a conference or filing written objections has expired.

(6) If no conference is requested, and the notice of proposed adjustment has asserted a deficiency, the department shall consider any objections made by the person denied the refund, make a determination of any issues

raised, pay any refunds, found due, with applicable interest, or assess any deficiency and mail a notice thereof within one year from the date of the notice of deficiency, unless an extension of time is agreed upon as described in subsection (7) of this section.

(7) If, prior to the expiration of any period of time prescribed in subsection (6) of this section for giving of notice of assessment, the department and the person consent in writing to the deficiency being assessed after the expiration of such prescribed period, such deficiency may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period agreed upon.

(8) If the department refunds the amount requested as provided in subsection (3) of this section, without examination or audit of the refund claim, the department shall give notice of this to the claimant at the time of making the refund. Thereafter, the department shall have one year in which to examine or audit the refund claim, and send the notice of proposed adjustment provided for in subsection (3) of this section, in addition to any time permitted in ORS 314.410 or 314.415.

(9) The failure to hold a requested conference within the one-year period prescribed in subsection (4) of this section shall not invalidate any assessment of deficiency made within the one-year period pursuant to subsection (8) of this section or within any extension of time made pursuant to subsection (7) of this section, but shall invalidate any assessment of interest or penalties attributable to the deficiency. After an assessment has been made, the department and the person assessed may still hold a conference in accordance with ORS 305.115(7) within 90 days from the date of assessment. If a conference is held, the 90-day period under ORS 305.280(2) shall run from the date of the conference officer's written determination of the issues.

(10) The claimant may appeal any notice of proposed adjustment, refund denial or notice of assessment in the manner provided in ORS 305.280. The failure to file written objections or to request or have a conference shall not affect the rights of appeal so provided. All notices and determinations shall set forth rights of appeal.

314.415 Refunds; interest; credits. (1)(a) If the department determines pursuant to ORS 305.270 that the amount of the tax due is less than the amount theretofore paid, the excess shall be refunded by the department with interest at the rate established under ORS 305.220, for each month or fraction of a month during a period beginning 45 days after the due date of the return or the date the tax was paid, whichever is the later, to the time the refund is made.

(b) No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions, of the return in respect of which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year. If the tax owed is less than $1, no refund shall be made.

* * * *

(e) The amount of the refund, exclusive of interest thereon, shall not exceed the portion of the tax paid during such period preceding the filing of the claim or, if no claim is filed, then during the period preceding the allowance of the refund during which a claim might have been filed. Where there has been an overpayment of any tax imposed, the amount of the overpayment and interest

thereon shall be credited against any tax, penalty or interest then due from the taxpayer, and only the balance shall be refunded.

(f) Except as provided in ORS 305.265(12), if, pursuant to a notice of deficiency or assessment, the taxpayer pays the amount specified in the notice, or any part thereof, and if, upon appeal, the department, the Oregon Tax Court or the Oregon Supreme Court orders that all or any part of the deficiency amount specified in the notice and paid by the taxpayer be refunded, the amount so ordered to be refunded shall bear interest at the rate established for refunds in ORS 305.220. Interest shall be computed from the date of payment to the department. Nothing in this paragraph shall require that interest be paid upon any amount for any period for which interest upon the same amount for the same period is required to be paid under ORS 305.419.

(2) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270 or subsection (1) of this section, if, prior to the expiration of the period prescribed in paragraph (b) of subsection (1) of this section, the department and the taxpayer consent in writing to the refund of tax after the expiration of the period prescribed, the refund shall be made at any time prior to the expiration of the period agreed upon and no refund shall be made or allowed after the expiration of the period agreed upon unless a claim for refund is filed by the taxpayer before the expiration of the period agreed upon in compliance with the manner prescribed by the department. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The department shall have the power to consent to such refund only where the taxpayer has consented to assessment of additional tax, if such be determined upon audit, after the expiration of the applicable three-year or five-year period prescribed in ORS 314.410(1) and (2).

* * * *

(5) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270, or other provisions of this section, if the taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in federal income tax for any year, the period within which a claim for credit or refund may be filed or credit or refund allowed or made if no claim is filed shall be the period provided within subsections (1) to (4) of this section or six months after the date of the expiration of the agreed period for assessing deficiency in federal income tax, whichever period expires the later.

(6) The department may make separate refunds of withheld taxes upon request by a husband or wife who has filed a joint return, the refund payable to each spouse being proportioned to the gross earnings of each shown by the information returns filed by the employer or otherwise shown to the satisfaction of the department.

(7) If a taxpayer entitled to a refund under subsection (1) of this section dies, the department may issue a draft for payment of such refund under the terms and conditions set out in ORS 293.490 to 293.500 exercising the same powers and subject to the same restrictions pursuant to which the State Treasurer is authorized to pay the amounts of warrants, checks or orders under those statutes.

305.265(5): Within 30 days from the date of the notice of deficiency, the person given notice shall pay the deficiency with interest computed to the date of payment and any penalty proposed. Or within that time the person shall advise the department in writing of objections to the deficiency, and may request a conference with the department, which shall be held prior to the expiration of the one-year period set forth in subsection (7) of this section.

305.405: As part of the judicial branch of state government, there is created a court of justice to be known

as the Oregon Tax Court. The Tax Court, in cases within its jurisdiction pursuant to ORS 305.410:

(1) Is a court of record and of general jurisdiction, not limited, special or inferior jurisdiction.

(2) Has the same powers as a circuit court.

(3) Has and may exercise all ordinary and extraordinary legal, equitable and provisional remedies available in the circuit courts, as well as such additional remedies as may be assigned to it.

305.410: [T]he tax court shall be the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state.

305.419: Except as provided in subsection (3) of this section, in any appeal from an order of the department involving a deficiency of taxes imposed or measured by net income, the tax assessed, and all penalties and interest due, shall be paid to the department on or before the filing of a complaint with the regular division of the Oregon Tax Court under ORS 305.560. The complaint shall be filed as a claim for refund.

305.990(4): Violation of ORS 305.815 is punishable, upon conviction, by a fine of not more than $1,000 or by imprisonment for not more than one year in the county jail, or both.

305.992(1): If any returns required to be filed under ORS chapter . . . 314 . . . are not filed for three consecutive years by the due date (including extensions) of the return required for the third consecutive year, there shall be a penalty for each year of 100 percent of the tax liability determined after credits and prepayments for each year.

(2): The penalty imposed under this section is in addition to any other penalty imposed by law. However, the total

amount of penalties imposed for any taxable year under this section, ORS 305.265(13) and 314.400 shall not exceed 100 percent of the tax liability.

314.400(1): If a taxpayer (a) fails to file a report or return of tax liabilty or of income at the time prescribed therefor, or (b) fails to pay a tax at the time the tax becomes due, there shall be added to the amount of tax required to be shown as tax on the report or return a delinquency penalty of five percent of the amount of such tax.

(2): If the failure to file a report or return continues for a period in excess of three months after the due date:

(a) There shall be added to the amount of tax required to be shown on the return a failure to file penalty of 20 percent of the amount of such tax; and

(b) Thereafter the department may send a notice and demand to the person to file a report or return within 30 days of the mailing of the notice. If after such notice and demand no return or report is filed within the 30 days, the department may determine the tax according to the best of its information and belief, assess the tax with appropriate penalty and interest plus an additional penalty of 25 percent of the tax deficiency determined by the department and give written notice of the determination and assessment to the person required to make the filing.

(3): A penalty equal to 100 percent of any deficiency determined by the department shall be assessed and collected if:

(a) There is a failure to file a report or return with intent to evade the tax;

(b) A report or return was falsely prepared and filed with intent to evade the tax; or

(c) A false claim was intentionally filed under ORS 310.630 to 310.690.

314.525(3): Interest shall accrue on the underpayment of estimated tax under ORS 314.505 to 314.525 at the rate established under ORS 305.220, for each month or fraction thereof during which period the estimated tax or any installment thereof remains unpaid. The penalty provisions contained in this chapter and ORS chapters 317 and 318 for underpayment of tax shall not apply to underpayments of estimated tax under ORS 314.505 to 314.525.

316.992(1): The department shall assess a penalty of $250 against any individual who files what purports to be a return of the tax imposed by this chapter but which:

(a): Does not contain information on which the substantial correctness of the self-assessment may be judged; or

(b): Contains information that on its face indicates that the self-assessment is substantially incorrect.

174.010: In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

305.765. Refund of taxes adjudged invalid.—Whenever, in a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort holds the law or any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or in the part thereof affected, has expired, and if there is no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the

year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to 305.785.

305.770. Report of taxpayers paying invalid tax; issuance and payments of warrants.—The department or agency of the state charged with the duty of administering the law so invalidated, either wholly or in part, shall prepare a detailed report, listing by name, address and amount of payment each taxpayer who paid an invalid tax under the law. The Executive Department shall issue a warrant in favor of each taxpayer listed therein, in the amount so reported, and shall forward the warrant to the taxpayer at the address shown in the report. The State Treasurer shall pay the warrants from the General Fund in the usual manner when and as presented. Warrants refunding invalid taxes shall be payable to the taxpayers named in the report required by this section or to their heirs, administrators, executors or assigns.

305.775. Interest on amount of refunds in certain cases.—If an appeal from or petition for certiorari to review a decision of the Supreme Court of Oregon, holding a tax law or any part thereof invalid, is taken to the Supreme Court of the United States and that court does not reverse or modify the decision of the Supreme Court of Oregon, the refund of the invalid taxes shall include interest on the amount paid at the rate of six percent from the date of the last decision of the Supreme Court of Oregon in the matter to the date of filing with the Secretary of State of the report and list of taxpayers entitled to the refunds as required by ORS 305.770.

305.780. Taxes due prior to year in which suit bought. —Nothing contained in ORS 305.770 to 305.785 authorizes the reunding of any tax collected and paid under an invalidated tax law, or invalidated part thereof, where the tax as provided in such law became due and payable in any year prior to the year in which the suit or action seeking the invalidation of the law or part thereof was instituted.

APPENDIX F

In re claims for and time within which same shall be made for refunds of personal income taxes paid on compensation received in the year 1938 and preceding years by employees of corporations owned and controlled by the state of Oregon.

January 24, 1940.

State Tax Commission,
State Office Building.

Gentlemen: I have for consideration your letter of December 18, 1939, concerning refunds of personal income taxes paid on compensation received in 1938 and preceding years by employees of corporations owned and controlled by the United States.

From the decision in the case of Meredith v. State Tax Commission, 29 Or. Advance Sheets, 529, it appears that such compensation was exempt from the operation of the state income tax law prior to the change in the federal law effected by the decision in Graves v. O'Keefe, 306 U. S. 466, and the Public Salary Tax Act of 1939. Under the aforementioned ruling of the United States supreme court, and congressional statute, taxes imposed on compensation received prior to January 1, 1939, for services rendered to the United States are not collectible by the states. However, even though such taxes were illegally collected under a mistake of law, they cannot be refunded except pursuant to express statutory authority. In this connection, your attention is directed to my opinion to you of November 12, 1930.

The particular statutes which relate to the authority of the tax commission to refund personal income taxes are: Chapter 229, Oregon Laws, 1931 (section 69-449, Oregon Code 1935 Supplement); subsection 6, section 5, chapter 387, Oregon Laws, 1933 (subsection 6, section 69-1521. Oregon Code 1935 Supplement); and section 14, chapter 488, Oregon Laws, 1939. (Because of its limited application chapter 337, Oregon Laws, 1931 (sec-

tion 69-748, et. seq., Oregon Code 1935 Supplement) does not seem material in this connection). If possible, these statutes must be construed so that effect will be given to each; but, if this cannot be done, the subsequent statute will be considered as qualifying or impliedly repealing the former to the extent necessary to resolve the conflict. State v. Linn county, 25 Or. 503; Benson v. Withycombe, 84 Or. 652; Winslow v. Fleischner, 112 Or. 23.

Chapter 229, Oregon Laws, 1931 (section 69-449, Oregon Code 1935 Supplement), authorizes the commission to refund all taxes and additional charges paid "in excess of those due or legally assessable, with interest at the rate of six per cent per annum from and after thirty days from the date of filing claim or refund". While that section contemplates that a claim for refund shall be filed, it does not specify a period of limitation. Such a period of limitation, however, is provided by a later enactment. Subsection 6, section 5, chapter 387, Oregon Laws, 1933, (subsection 6, section 69-1521, Oregon Code 1935 Supplement) provides that "no refund shall be allowed or made after two years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer". The different period of limitation specified in section 69-1522, Oregon Code 1935 Supplement, as amended by section 14, chapter 488, Oregon Laws, 1939, does not seem applicable to the tax years here involved because section 20 of that chapter states:

> "It is expressly intended that, except as otherwise provided, the amendments contained herein shall be applicable to all tax years beginning after December 31, 1938, and that income for tax years beginning prior to January 1, 1939, shall be taxed according to the law applicable to such years."

Upon the basis of these considerations it is my opinion that the commission has no authority to refund a tax paid

under a mistake of law unless the refund is made, or a claim therefor is filed by the taxpayer, within two years from the time the tax was paid.

Your second inquiry concerns the nature of a claim for refund. While the statute does not specify what constitutes a sufficient claim, it appears that the commission in pursuance of its statutory authority, particularly that conferred by section 69-1536, Oregon Code 1930, has provided by regulation:

> "Application for refund must be accompanied by a statement of facts upon which the application is based, and if the refund is claimed because of an error in the return, the application must be accompanied by an amended return." Oregon Tax Regulations, article 195.

While the provisions of the statute and regulations with regard to filing claims for refund must be strictly complied with, they are not designed as traps for the unwary and should be realistically construed. Tucker v. Alexander, 275 U. S. 228; Grays Harbor Motorship Corporation v. United States, 45 F. (2d) 259, 282; American Security & Trust Co. v. Tait, 5 F. Supp. 337, 345. Thus, the mere filing of a return or payment of a tax under protest is not sufficient. Mutual Trust Life Ins. Co. v. United States, 45 F. (2d) 288, 290; Semmes Motor Co. v. United States, 7 A. F. T. R. 9119, 9121. The requirements of the statute are substantially complied with if the taxpayer submits a statement or letter of protest giving notice of the particular tax for which a refund is sought, the amount of refund applied for, and the grounds upon which the claim is founded. United States v. Felt & Terrant Mfg. Co., 283 U. S. 269. Where such an informal claim is filed and accepted by the administrative officials within the statutory period of limitation, it constitutes a valid basis upon which the refund may be made even though the claim is not formally perfected until after the statutory period is lapsed. Night Hawk Leasing Co. v. United States, 18 F. Supp. 938, 942.

Based upon these authorities it is my opinion an informal claim which was filed within the statutory period and which otherwise substantially complied with the requirements of the statutes and regulations pertaining to the tax years in question, may be perfected and allowed after the statutory period has elapsed.

I. H. VAN WINKLE,
Attorney General.

APPENDIX G

EXCERPT FROM THE RESPONDENT'S BRIEF IN THE SUPREME COURT OF OREGON IN THE CASE OF NUTBROWN V. MUNN, CASE NO. SC S36652

* * * *

The Tax Injunction Act prohibits enjoining state tax administration except where the state remedy is not "plain, speedy and efficient." The principles of comity on which the *McNary* majority relied require initial resort to state remedies unless they are not "plain, adequate, and complete." *McNary, supra,* 454 US at 116. The *McNary* Court could "discern no significant difference, for purposes of the principles recognized in this case," between the two standards. *Id.* n. 8.[15] Thus, if the state provides remedies that protect federal rights adequately as a matter of federal law, federal law will defer to those remedies subject only to ultimate review for constitutionality by the Supreme Court. *See McNary, supra,* 454 US at 116.

* * * *

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[15] In *Rosewell v. LaSalle National Bank, supra,* the Court's majority declined to equate "plain, speedy and efficient" as used in the Tax Injunction Act, with the equitable rule of "plain, adequate and complete." 450 US at 526-27. The Court noted as the basis for finding a difference that, under equity practice prior to the Act, interest was required before the remedy would be considered adequate. *Id.* Because the Oregon system requires DOR to pay interest on refunds, ORS 305.220, ORS 305.222, ORS 305.270 and ORS 314.415, whatever difference the two formulations may entail is irrelevant to the analysis of the adequacy of the Oregon remedy.

APPENDIX H

EXCERPT FROM RESPONDENT'S BRIEF IN OPPOSITION IN NUTBROWN V. MUNN, NO. U.S. 91-457

* * * *

Examining the language and history of the Tax Injunction Act in *Rosewell*, the Court concluded that the requirement of a "plain, speedy and efficient" remedy referred only to the *procedural adequacy* of the remedy. 450 U.S. at 512-525. A state remedy is adequate if the taxpayer had a "full hearing and judicial determination of the controversy." 450 U.S. at 514, *quoting* S. Rep. No. 701, 72d Cong., 1st Sess., 2 (1932). The Court stated:

> There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a "full hearing and judicial determination", at which she may raise any and all constitutional objections to the tax. . . . Appeal to the higher Illinois courts is authorized . . . and review is ultimately available in this Court . . . . Respondent does not allege any procedural defect in the Illinois remedy, other than delay, . . . that would preclude preservation and consideration of her federal rights, since she is free to raise her equal protection and due process federal objections during the Application for Judgment proceedings before the Circuit Court of Cook County.

450 U.S. at 514-15 (citations omitted).

The delay in coming to court, if any, caused by the exhaustion requirement does not render the administrative process inadequate. Indeed, the Illinois remedies considered in *Rosewell* were far more burdensome than those of which petitioners complain, resulting in delays of over two years at a time to obtain relief for repeated and egregious overassessment. Moreover, the Illinois system

provided no interest to the ultimately victorious taxpayer, unlike the Oregon system. *See* Or. Rev. Stat.§§ 305.220, 305.222, 305.270 and 314.415.

Petitioners focus narrowly on the administrative process, asserting that they have asked for relief not available from the agency. By contrast, in both *Rosewell* and *Grace Brethren* the Court looked not only at the administrative process, but also at the judicial avenues open to the taxpayer dissatisfied with the results obtained in that process to determine whether petitioners had the opportunity for a full hearing and judicial review of their claims. Even though the California administrative agency in *Grace Brethren* lacked authority to declare the challenged statute unconstitutional, 457 U.S. at 413 n. 30, this Court found the state remedies plain, speedy and efficient because they met minimal procedural requirements and provided a full hearing and judicial review. Despite petitioners' attempts to evade the plain meaning of the Oregon Supreme Court's opinion, the Oregon courts provide a judicial forum for consideration and review of all their claims if they remain dissatisfied after availing themselves of the administrative process.[12] The state remedies are adequate.

* * * *

[12] Even if the Court's examination were limited solely to the remedies provided by the administrative process, petitioners' argument is obviously flawed. If they were correct, any party could avoid an exhaustion requirement, whether state or federal, by simply asserting a manifestly frivolous claim for a form of relief the agency in question was not authorized to grant.

Supreme Court, U.S.
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No. 95-279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

OREGON DEPARTMENT OF REVENUE

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION, THE VETERANS OF FOREIGN WARS OF THE UNITED STATES OF AMERICA, AND TWENTY-SEVEN OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONER

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The Retired Officers Association, the Veterans of Foreign Wars of the United States of America, and twenty-seven other military and veteran organizations file this brief *amici curiae* in support of petitioner and urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of Oregon.[1]

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[1] Counsel for petitioner and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

INTEREST OF *AMICI*

Amici are The Retired Officer Association (TROA), the Veterans of Foreign Wars of the United States of America (VFW), and twenty-seven other military and veteran organizations.[2] TROA is a not for profit corporation that is dedicated to serving and protecting the interests of past and present active, reserve and retired commissioned and warrant officers in all seven of the uniformed services. Founded in 1929, TROA now has a membership of approximately 400,000 current and former officers and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress, and, on rare and extreme occasions, before courts of the United States.

The VFW was formed almost a century ago to protect the interests of men and women (and their families and survivors) who have risked their lives in defense of the United States of America in foreign campaigns. Its membership contains all ranks and grades of past and present members of the armed forces of the United States and today numbers over 2.1 million.

The twenty-seven other military and veteran organizations have a combined membership of over a million and a half current and former members of the uniformed services of the United States. Some of these organizations are focused on the interests of certain specializations within the uniformed service (*e.g.*, the Military Chaplains Association; the Association of Military Surgeons of the United States); some on particular branches of military service (*e.g.*, the Air Force Association; the Marine Corps League; the Fleet Reserve Association; U.S. Coast Guard Chief Petty Officers Association; U.S. Army Warrant Officers Assocation; Commissioned Officers Association of the U.S. Public Health Service). Some of these organizations are of relatively recent origin (*e.g.*, the Enlisted

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[2] A complete listing and description of the organizations joining in this brief appear as Appendix A to this brief.

Association of the National Guard of the United States (founded in 1970); the National Order of the Battlefield Commissions (founded in 1978)); some have been championing the cause of the military services for a century or more (*e.g.*, the Jewish War Veterans of the USA (founded in 1896); the National Guard Association of the United States (founded in 1878)).

Old or new, large or small, each of the twenty-nine military and veteran organizations that have joined in this brief shares one common thread: they stand to assure that those men and women who have risked, and in some cases sacrificed, their lives in defense of the United States of America are treated with fairness and accorded the respect and dignity their service has earned. They join together in this brief because, as the decision of the Supreme Court of Oregon sadly demonstrates, military retirees have recently become the victims of states' invidious efforts to withhold property taken in violation of the Constitution of the United States. Because Oregon and other states are undermining the very values that their members fought to protect, these organizations join together to urge this Court to reverse the decision of the court below and send an unmistakable message to all taxing authorities that integrity and fairness must be the cornerstones of governance, not gamesmanship.

REASONS FOR GRANTING THE PETITION

In certain respects, this case is old hat: it is but the latest in a long line of cases coming to this Court challenging a state's denial of refunds of taxes imposed on federal retirees in violation of 4 U.S.C. § 111. Since this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court has seen 24 petitions from 16 states.[4] This Court has granted plenary review

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[4] Arkansas—*Pledger v. Bosnick*, 113 S. Ct. 3034 (1993); Arizona—*Estate of Bohn v. Waddell*, 113 S. Ct. 3000 (1993); Colo-

and reversed in three post-*Davis* cases [4] and it has yet to allow a state to refuse altogether to refund taxes unconstitutionally imposed on federal retirees. Simply to assure application of its post-*Davis* jurisprudence in Oregon as in all other states that discriminatorily taxed federal retirees, this Court should grant the petition and reverse the decision below.

In another respect, however, this case has a far broader and more ominous impact: it represents another example of the disturbing trend among state courts to disregard and defy this Court's mandates in the name of fiscal expediency. There can be no dispute that the court below failed to heed this Court's holding in *Reich v. Collins*, 115 S. Ct. 547 (1994): in all pertinent respects the decision below is a mirror image of the Georgia Supreme Court's decision in *Reich*. Indeed, if anything, the case below paints a more compelling picture of a "bait and switch" than did *Reich*.

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rado—*Kuhn v. Colorado*, 504 U.S. 901 (1992); Georgia—*Reich v. Collins*, 113 S. Ct. 3025 (1993) and 114 S. Ct. 1048 (1994); Iowa—*McManus v. Iowa*, 502 U.S. 823 (1991); Kansas—*Barker v. Kansas*, 503 U.S. 594 (1992); Massachusetts—*Filios v. Commissioner of Revenue*, 114 S. Ct. 1538 (1994); Missouri—*Hackman v. Missouri Department of Revenue*, 493 U.S. 1019 (1990); Montana—*Sheehy v. Montana*, 113 S. Ct. 3025 (1993); New York—*Duffy v. Wetzler*, 113 S. Ct. 3027 (1993) and 115 S. Ct. 779 (1994); Oregon—*Nutbrown v. Munn*, 502 U.S. 1030 (1992); North Carolina—*Swanson v. Powers*, 112 S. Ct. 871 (1992); *Swanson v. North Carolina*, 113 S. Ct. 3025 (1993) and 115 S. Ct. 662 (1995); South Carolina—*Bass v. South Carolina*, 501 U.S. 1246 (1991) and 113 S. Ct. 3025 (1993); Virginia—*Harper v. Virginia Department of Taxation*, 501 U.S. 1247 (1991) and 113 S. Ct. 2510 (1993) and *Lewy v. Virginia Department of Taxation*, 501 U.S. 1247 (1991) and 113 S. Ct. 3024 (1993); West Virginia—*Brown v. Paige*, 115 S. Ct. 207 (1994); Wisconsin—*Hogan v. Musolf*, 502 U.S. 1030 (1992).

[4] *Barker v. Kansas*, 503 U.S. 594 (1992); *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993); *Reich v. Collins*, 115 S. Ct. 547 (1994).

As this Court recently reiterated in *National Private Truck Council v. Oklahoma Tax Commission*, 115 S. Ct. 2351, 2354 (1995), "principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration." The decision below is a chilling example of how taxing authorities and state courts are exploiting this deference at the expense of taxpayers' federally guaranteed rights. Knowing that this Court typically is the only federal court that has jurisdiction to entertain a federal law challenge to state taxation, and knowing that this Court does not and cannot grant every petition presenting an erroneous application of federal law, state courts are brazenly defying this Court's mandates in pursuit of pecuniary gain. Review by this Court is necessary here to reassert the primacy of federal law and preserve this Court's role as the supreme court of the United States.

I. THE DECISION BELOW IS IRRECONCILABLE WITH *REICH*

There can be no dispute that the court below failed to heed the mandate of *Reich*. The decision below is a virtual carbon copy of the Georgia Supreme Court's decision in *Reich*; indeed, if anything, the decision below is more egregious than the Georgia Supreme Court's.

Like the court below, the Supreme Court of Georgia had construed the state's tax refund statute to deny federal retirees refunds of the taxes unconstitutionally imposed on their pensions. In holding that the Supreme Court of Georgia had unfairly reconfigured Georgia's refund scheme, this Court focused on four factors: 1) the plain language of the refund statute; 2) the state's representations about the scope of that statute in federal court; 3) judicial construction of that statute; and 4) states' ordinary preference that taxpayers pursue only postdeprivation remedies. *Reich*, 115 S. Ct. at 549. Consideration of these factors in this case yields the same conclusion: Oregon has unfairly reconfigured its tax scheme so that

it can deny federal retirees refunds of taxes the Constitution forbade it to assess.

1. As in Georgia, Oregon law contains an omnibus tax refund statute providing that, upon timely application, "any excess tax *shall be refunded* with interest . . . ." Or. Rev. Stat. § 305.270(1), emphasis added. And, as in Georgia, the state Supreme Court concluded that this ostensibly available remedy was in fact inapplicable and that instead taxpayers were required to follow essentially a pay under protest route. *See* Or. Rev. Stat. § 305.765 (providing for refunds in cases of invalidated taxes in the years of and after the initiation of the challenge to the tax).

Reich made clear that the measure of the constitutional sufficiency of state refund schemes must be taken from the perspective of a "reasonable taxpayer." 115 S. Ct. at 550; *see also* 115 S. Ct. at 549 (focusing on the "average taxpayer"). A reasonable taxpayer, reading the omnibus refund statute, could only conclude that the language "any excess tax shall be refunded" provided an entitlement to a refund of any taxes paid in excess of what was due.

The court below, however, rejected this reasonable construction of the omnibus refund statute and concluded instead that Or. Rev. Stat. § 305.765 was the exclusive means to recover refunds of taxes determined to be invalid. For at least two reasons, the plain language of Or. Rev. Stat. § 305.765 does not bear out this construction.

First, that statute does not concern taxpayers' *claims* for refunds. Rather, it affirmatively obligates the state, in cases of invalidated tax laws, to make refunds to all taxpayers who paid the unlawful tax, irrespective of whether they made a claim for such a refund. That is, the law requires the state to refund "*all taxes collected and paid under the law* or part thereof invalidated"; to make a "detailed report . . . of each taxpayer who paid

an invalid tax under the law"; and to "issue [and forward] a warrant in favor of each taxpayer listed in the report." Or. Rev. Stat. §§ 305.765, 305.770 (emphasis added). Thus, on its face Or. Rev. Stat. § 305.765 affirmatively imposes an obligation on the state without purporting to limit taxpayers' other remedies.

Indeed, Or. Rev. Stat. § 305.765 specifically provides that it applies only "if there is no other statute authorizing [a] refund." Here, of course, the omnibus refund statute specifically authorizes a refund to taxpayers who timely applied for income tax refunds. Thus, these statutes work neatly together: the omnibus refund statute provides relief to taxpayers who timely seek relief; Or. Rev. Stat. § 305.765 provides relief to taxpayers who paid taxes subsequently declared to be invalid, but who did not timely file refund claims.

Accordingly, a reasonable taxpayer would not have read Or. Rev. Stat. § 305.765 to be the "*exclusive* remedy for unlawful taxes." *Reich,* 115 S. Ct. at 550, emphasis original. Rather, a reasonable taxpayer would have concluded that that remedy was applicable only to those who did not file a timely claim for a refund; for those who did, the omnibus tax refund statute provided full relief. Looking no further than the plain language of the applicable refund statutes, an Oregon taxpayer would "think it obvious" that he was entitled to a refund under Oregon's omnibus tax refund statute, Or. Rev. Stat. § 305.270. *Reich,* 115 S. Ct. at 549.

2. The second factor relied upon in *Reich* was Georgia's convincing representation in the Eleventh Circuit that its refund statute provided a sufficiently "plain, speedy and efficient" state court remedy to preclude federal jurisdiction. 115 S. Ct. at 549, *citing Waldron v. Collins,* 788 F.2d 736, 738 (11th Cir.), *cert. denied,* 479 U.S. 884 (1986). Here, Oregon has done Georgia one better: it has made its representation about the applicability of Or. Rev. Stat. § 305.270 not just in any fed-

eral court, but indeed in the Supreme Court of the United States.

Specifically, in *Nutbrown v. Munn*, 811 P.2d 131, 143 (1991), *cert. denied*, 502 U.S. 1030 (1992), the Supreme Court of Oregon held that federal retirees were not entitled to relief under 42 U.S.C. § 1983 because they had failed to exhaust their administrative remedies. In successfully urging this Court to deny the ensuing petition for certiorari, the state argued that resort to federal causes of action was unnecessary as full relief was available under state law. *See* Pet. App. H at 48a-49a. The statutes the state identified as providing this complete relief were Or. Rev. Stat. § 305.270 (providing for refunds of "any excess tax"), Or. Rev. Stat. §§ 305.220 and 305.222 (fixing interest on refunds) and Or. Rev. Stat. § 314.415 (allowing for refund claims to be made up to three years after the taxes have been paid). *Id.* Yet, just as in Georgia, after making this representation, the state later convinced its Supreme Court that these same provisions were wholly inapposite. Pet. App. 12a.

3. In concluding that Georgia had reconfigured its refund scheme in midstream, this Court also focused on the absence of any state court decisions purporting to limit the apparent breadth of the refund statute. *Reich*, 115 S. Ct. at 549. As in Georgia, the court below failed to cite any authority adopting its limited construction of Oregon's refund statutes that predated the payment of the taxes in issue here. Indeed, other than the federal retiree refund cases, there is not a single case in Oregon history applying Or. Rev. Stat. § 305.765. Thus, the best the court could come up with to support its novel and parsimonious construction of Oregon's omnibus tax refund statute was a selective recitation of Attorney General opinions issued around the time of the passage of the refund statute. *See* Pet. App. A at 8a-9a.

Although not apparent from the decision below, Oregon caselaw is replete with instances where taxpayers have

obtained refunds of invalidly imposed taxes for tax years predating the initiation of the action. For example, in *Smith Kline & French Laboratories v. State Tax Comm'n*, 403 P.2d 375, 380 (Or. 1965) the Supreme Court of Oregon held a corporate income tax invalid under the Supremacy Clause and refunded taxes imposed during the three years preceding the initiation of the challenge. Similarly, in *Wood v. Department of Revenue*, 749 P.2d 1169, 1174 (Or. 1988), the court invalidated a state personal income tax under the Privileges and Immunities Clause and refunded taxes imposed during the three years preceding the initiation of the challenge. *See also Waterbury v. Department of Revenue*, 11 Or. Tax 314, 316 (1989) (providing refunds, interest and attorney fees for personal income taxes assessed in violation of the intergovernmental tax immunity doctrine).

The most compelling evidence of Oregon's about face on the scope of the refund statute, however, is found in *Nutbrown v. Munn*, 811 P.2d at 1141. In that § 1983 action, federal retirees sought refunds of the taxes imposed during the years 1985 through 1988. In dismissing the suit, the Oregon Supreme Court held that Or. Rev. Stat. § 305.270 provided federal retirees full relief:

> [T]he Department can (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system.

Id. In its decision below, the court did not even mention, much less seek to explain, this absolute reversal in its construction of Oregon's tax refund statutes.

As noted above, the closest the court below could come to finding support for its novel and counterintuitive construction of the omnibus tax refund statute was citation of two tangential Attorney General opinions. The court failed to cite, however, the most germane Attorney General opinion; indeed, one that is directly on point. Specifically, after the Supreme Court of Oregon held in

Meredith v. State Tax Commission, 96 P.2d 1082, 1085 (Or. 1939), that the salary of an employee of a government owned corporation could not be subjected to Oregon income tax, the question arose whether other nonlitigating employees of federally owned corporations were entitled to refunds. Citing the prior codification of the omnibus tax refund statute, the Attorney General concluded:

> [T]he commission has no authority to refund a tax paid under a mistake of law unless the refund is made, or *a claim therefor is filed* by the taxpayer, *within two years from the time the tax was paid.*

19 Op. Att'y Gen. 557 (Or. 1940), *reproduced at* Pet. App. F at 43a-46a (emphasis added).

Thus, here again, Oregon has done Georgia one better. Not only is the limited reading of the omnibus tax refund statute bereft of authority, and not only is there uniform precedent confirming the apparent breadth of Or. Rev. Stat. § 305.270, but so too there is a contrary Attorney General opinion directly on point.

4. Lastly, in *Reich*, this Court "f[ou]nd it significant that, for obvious reasons, States ordinarily *prefer* that taxpayers pursue only postdeprivation remedies; *i.e.*, that taxpayers 'pay first, litigate later.'" 115 S. Ct. at 549 (emphasis original). Georgia, of course, claimed that it provided and preferred its taxpayers to pursue predeprivation remedies. Oregon, however, makes no such claim. Rather, as the court below held, "[t]here is no question that Oregon's statutes encourage payment of a tax before litigation of a claim for relief." Pet. App. A at 15a.

Thus, on every level the decision below is irreconcilable with *Reich* and even more egregious than the Georgia Supreme Court's. Oregon has strained mightily to keep the federal retirees' property in defiance of its own statutes and the Constitution of the United States; in so doing it has strained credulity. Review by this Court is necessary to assure that no state may escape its obligation

to return the taxes unconstitutionally imposed on federal retirees by resort to "bait and switch" tactics that make a mockery of due process.

II. THIS COURT CANNOT ALLOW STATES' NOTIONS OF FISCAL EXPEDIENCY TO EXCUSE DEFIANCE OF ITS DECISIONS

Much of this Court's § 1983 jurisprudence is built around Congress' recognition that state officers and state courts may not always be trusted to vindicate federally protected rights. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). In part for this reason, § 1983 was enacted as "an attempt to remedy the state courts' failure to secure federal rights." *Id.*, 407 U.S. at 241.

By operation of "principles of federalism and comity," however, taxpayers are ordinarily remitted exclusively to state courts and state procedures to seek protection of their federal rights. *National Private Truck Council v. Oklahoma Tax Commission*, 115 S. Ct. at 2354. Recent experience, exemplified by the decision below, shows that state courts are abusing the deference this Court accords them in tax matters, even to the point of simply ignoring this Court's decisions. The Eleventh Amendment and principles of comity have become the states' refuge; but neither the Constitution nor the prudential principles that underlie our jurisprudence requires that states be allowed so flagrantly to disregard their obligations to treat their taxpayers fairly and even-handedly.

While the decision below is shocking in its brazen disregard of *Reich*, what is more shocking and disturbing is that the decision is anything but an anomaly. Indeed, its virtual twin is already pending on this Court's docket. *See General Motors Corp. v. Kansas City, Missouri*, U.S. No. 95-195 (petition for certiorari filed July 21, 1995). In that case, the state court denied refunds on the basis of a newly adopted construction of a refund statute; a construction that had previously been rejected by the trial

court and the intermediate appellate court in that very case. Similarly, on remand in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), the Department of Taxation argues that "*Reich* has no application" [5] and taxpayers are entitled to no relief, even though Virginia provides by statute that "the Tax Commissioner *shall order a refund*" of erroneous assessments of tax. Va. Code § 58.1-499.

State courts and state taxing authorities have simply ignored *Reich* and continued to employ the "bait and switch" stratagems condemned by this Court. The decision below, the decision in *General Motors Corp. v. Kansas City*, and the arguments put forth on remand in *Harper* are a direct affront to the authority of this Court. Whether it is because they believe the chances of further review are too remote, or because the fiscal demands on the state are so great, state courts and state taxing auhorities "having ears to hear, hear not" the pronouncements of this Court. *Mitchum v. Foster*, 407 U.S. at 241. Review by this Court is necessary to remind state courts and state taxing authorities that they may not ignore this Court's decisions simply because compliance would be expensive. And, just as in the civil rights cases that have informed much of this Court's recent jurisprudence, bold and decisive action is required to underscore that neither the Constitution nor this Court will tolerate gamesmanship in state tax matters.

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[5] *See* Brief for Appellee at 42, *Harper v. Virginia Department of Taxation*, No. 940326 (Va.) (argued June 7, 1995).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted and its decision reversed.

Respectfully submitted,

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September 14, 1995

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APPENDIX

The following organizations join in this brief in support of the petition for a writ of certiorari to the Supreme Court of Oregon:

Air Force Association (AFA)

Founded in 1946. Approximately 200,000 members. Membership in AFA is open to anyone who serves or has served in the U.S. Military. Other American citizens may affiliate as patrons. Mission is to provide public understanding of aerospace power, need to support a strong national defense and to represent needs of men and women who serve and have served in USAF.

Air Force Sergeants Association (AFSA)

Founded in 1961. Approximately 161,000 members. Established to serve as the voice of Air Force enlisted personnel. Membership is open to any active or retired enlisted Air Force, Air Force Reserve and Air National Guard members, and their families.

Army Aviation Association of America (AAAA)

Founded in 1957. Approximately 16,000 members. Membership in AAAA is open to all persons who desire to support the furtherance of U.S. Army Aviation or its allied pursuits.

Association of Military Surgeons of the United States (AMSUS)

Chartered by Congress in 1903. Approximately 13,000 members. Membership is open to past and present commissioned officers or GS-9 and above civilians in the Federal Health Agencies including USA, USAR, USN, USNR, USAF, USAFR, ARNG, ANG, USPHS, USCG and VA; officers of military medical services of other nations; and past and present medical consultants to the

chiefs of the federal medical services. Mission is dedicated to the advancement of all aspects of health care within the Federal Health Agencies.

Association of the U.S. Army (AUSA)

Founded in 1950. Approximately 115,000 individual and 240 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

Commissioned Officers Association of the U.S. Public Health Service (COA)

Founded 1937. Approximately 6,900 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. Mission is to protect the interests and welfare of commissioned officers of the PHS.

CW & WO Assn. US Coast Guard

Founded in 1929. Approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

Enlisted Association of the National Guard of the U.S. (EANGUS)

Founded 1970. Approximately 60,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status,

welfare and professionalism of enlisted members of the National Guard.

Fleet Reserve Association (FRA)

Chartered November 11, 1924. Over 160,000 members plus 20,000 member Ladies Auxiliary. Membership is open to active duty, drilling reserve, and retired enlisted personnel and commissioned officers with prior enlisted service in the Navy, Marine Corps and Coast Guard. Mission is to represent its members on military compensation, benefits and entitlements legislation before the Congress.

Jewish War Veterans of the USA

Founded in 1896. Approximately 100,000 members. Membership is open to veterans of wartime service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

Marine Corps League (MCL)

Founded in 1923. Approximately 45,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

Marine Corps Reserve Officers Association (MCROA)

Founded in 1928. Approximately 5,500 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

Military Chaplains Association of the USA (MCA)

Founded in 1925 and chartered by Congress in 1950. Approximately 1,600 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

Military Order of the Purple Heart of the USA (MOPH)

Founded in 1932. Chartered by Congress in 1958. Approximately 30,000 members. Membership open to recipients of the Purple Heart. Mission (among others) is to a) assist and aid its members and families and b) preserve and defend the United States of America from all enemies whomsoever.

National Association for Uniformed Services (NAUS)

Founded in 1968. Approximately 160,000 members. Membership is open to all services, Army, Navy, Air Force, Marines, Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration—representing all grades, ranks, components, and branches. Membership represents the entire military/veteran family and mirrors the nation's seven uniformed services and active military force both enlisted and officers.

National Guard Association of the United States (NGAUS)

Founded in 1878. Approximately 58,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to pro-

vide personnel benefits and entitlements for the half million members of the National Guard.

National Military Family Association (NMFA)

Founded in 1969. Approximately 10,000 family members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members and survivors. NMFA's mission is to serve military and other uniformed service families through education, information and advocacy.

National Order of The Battlefield Commissions (NOBC)

Founded 1978. Approximately 1,000 members. Membership is open to any individual of any service who has been Commissioned in the Armed Forces of the United States as a result of combat action. Mission is to support a strong and responsive national defense by supporting those Americans that follow our flag.

Naval Enlisted Reserve Association (NERA)

Founded in 1957. Approximately 15,000 members. Membership in NERA is open to active and retired enlisted reservists in the Coast Guard, Marine Corps and Navy and to all other interested citizens. NERA is dedicated to promoting and maintaining career service in the Sea Service Reserve.

Naval Reserve Association (NRA)

Founded in 1954. Approximately 24,000 members. Membership in the NRA is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

Navy League of the United States (NLUS)

Founded in 1902. Approximately 68,000 members. Membership is open to civilians, military reservists and re-

tirees. The League's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

Non Commissioned Officers Association (NCOA)

Founded in 1960. Chartered by Congress in 1988. Approximately 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 through E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran noncommissioned and petty officers in all five branches of the armed forces, and provide opportunities for them to join patriotic, fraternal, social and benevolent activities.

Reserve Officers Association (ROA)

Organized in 1922, and chartered by Congress in June 1950. Approximately 100,000 members. Originally, the Reserve Officers Association consisted solely of Army officers, Reserve officers, National Guard officers, and retired officers. Following World War II, the Reserve Officers Association expanded its membership to all services.

The Retired Enlisted Association (TREA)

Founded in 1963 and chartered by Congress. Approximately 77,000 members. Membership open to enlisted retirees from all branches of the service, their surviving spouses and active duty members with over 20 years of service. Mission is to protect earned benefits of retired and career enlisted and their families.

The Retired Officers Association (TROA)

Founded in 1929. Approximately 400,000 members. Membership in TROA is open to all past and present, active, reserve and retired commissioned and warrant

officers in any of the seven uniformed services and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress.

United Armed Forces Association (UAFA)

Founded in 1987. Approximately 18,000 members. Membership is open to E-1 through O-10, Active Duty, Retired, Reserve, National Guard, Veterans of all five uniformed military services. Mission is to represent the members of the Armed Forces before Congress on legislation matters affecting them.

U.S. Army Warrant Officers Association (USAWO)

Founded 1973. Approximately 5,000 members. Membership is open to active duty, National Guard, reserve and retired Army warrant officers. Mission is to recommend improvement of the Army and to promote technical and professional information among warrant officers.

U.S. Coast Guard Chief Petty Officers Association (CPOA)

Founded in 1969. Its 10,000 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the Association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

Veterans of Foreign Wars of the United States of America (VFW)

Founded in 1899. Approximately 2.1 million members. Membership is open to all grades and ranks of past and present members of the U.S. armed forces. Eligibility requirements are a discharge under honorable conditions and the award of a Department of Defense authorized campaign or foreign service medal. Missions are fraternal, patriotic, historical, and educational.

(3)

No. 95-279

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF OF AMICUS CURIAE TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-279

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF OF AMICUS CURIAE TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent more than 2,700 of the leading businesses in the United States and Canada.

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[1] Tax Executives Institute has received the written consents of the Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause, Due Process, and Equal Protection rights of all taxpayers. Our members have a significant interest in the standards to be applied with respect to state remedies for unconstitutionally collected state taxes.

This case raises fundamental questions concerning the remedies available for taxpayers who have paid state taxes that are subsequently found to contravene the Constitution. In 1989, the Court held in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), that 4 U.S.C. § 111 (1985) and the constitutional doctrine of intergovernmental tax immunity (as derived from the Supremacy Clause) prohibit the States from taxing federal annuitants more harshly than state annuitants. Four years later, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—that *Davis* must be applied retroactively by all courts. And last year, in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court held that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and declare, after taxpayers have paid the disputed tax, that no such remedy exists.

This case focuses—once again—on what remedies a State may use to deny taxpayers a refund of unconstitutionally collected taxes. Specifically, the issue is whether the State of Oregon has improperly "reconfigure[d] its scheme, unfairly, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch"

later to a cry of inapplicability. *Reich*, 115 S. Ct. at 550. More fundamentally, the case involves the effect to be given to the Court's decisions under the Supremacy Clause and the doctrine of *stare decisis* and whether the States may vitiate the constitutional protections they safeguard by arrogating to themselves the power to distinguish away those decisions on the flimsiest of grounds.

The Institute's members and the businesses by whom they are employed have no direct interest in the resolution of this case. They do, however, have a keen and vital interest in determining the remedies that must be accorded aggrieved taxpayers when a state statute is invalidated on constitutional grounds. This case promises to affect far more than the State of Oregon's or any other State's authority to retain the unconstitutional taxes they improperly collected from federal annuitants. Indeed, the very legitimacy, strength, and vitality of this Court's holdings are at issue. TEI is concerned about the deleterious effect the Oregon court's decision could have on the equitable administration of state taxing schemes, especially those relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application of the Oregon court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

The core issue in this case—whether a taxpayer who has been subjected to an unconstitutional tax levy is entitled to a refund of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. The specific issue before the Court is whether the State of Oregon must refund unconstitutionally collected taxes imposed on federal retirees. In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while

exempting all or part of the pensions of state government retirees. Four years later, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—that *Davis* must be applied retroactively by all courts. And last year, in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court held that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and declare, after taxpayers have paid the disputed tax, that no such remedy exists.

Without a remedy, taxpayer's rights are illusory and without regard. The last decade has seen an almost unprecedented number of state taxing statutes struck down as unconstitutional, including the *Davis* decision upending the States' discriminatory scheme of taxing retired federal employees. Even after the Court struck down the statutes as contravening the Constitution, some (albeit not all) States resisted efforts to refund the taxes that they had collected under the invalidated laws. That the States have moved from a constitutional argument to a plea for prospectivity to a strained construction of their remedial statutes should not obscure this basic truth: The States have funds properly belonging to taxpayers.

The States' refusal to fashion meaningful remedies was commonly rationalized on equity grounds. Although many argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers, experience convinced this Court that *Chevron Oil* was too pliant to be useful. Consequently, two years ago in *Harper*, this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). It is this rule of law that the State of Oregon, by its interpretative sleight of hand, has endeavored to eviscerate.

In *Reich*, the Court clearly repudiated the State's "bait and switch" tactics and ordered meaningful backward

looking relief. 115 S. Ct. at 550-51. Nevertheless, the Oregon court refused to order a refund to the taxpayer and its refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). To be sure, Oregon's defiance of *Reich* has been masked. The State cleverly sought to distinguish the case out of existence by contorting the plain meaning of Oregon's refund statute and thereby obliterating almost six decades of precedent. It is precisely the type of reconfiguration that the Court found abhorent in *Reich*. 115 S. Ct. at 550.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. In the past decade, however, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and on the issue of remedies. The Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Unless the Court reviews this case and orders meaningful relief, the States will continue to have an incentive to enact unconstitutional statutes, knowing that—at worst—they may have to mend their ways in the future.

There has been much discussion of late of the public's distrust of government and its doubts about its role, abilities, and basic integrity. More than half a decade has passed since the Court held laws like the State of Oregon's here to be unconstitutional. The States' actions in thwarting the implementation of this Court's decisions cannot help but undermine the people's trust in government and the spirit of fair play. No longer should defiance of the Court's mandates be ignored. It is time to say, once again, that the "time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. at 323.

The Court should grant a writ of certiorari, reverse the decision of the Supreme Court of Oregon, and order the State to refund the monies it unconstitutionally extracted from Petitioner.

ARGUMENT

I.

Things without all remedy
Should be without regard: what's done is done.[2]

The core issue in this case—whether taxpayers who have been subjected to an unconstitutional tax levy are entitled to refunds of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. To be sure, the taxing schemes invalidated by the Court have varied. And the focus of the Court's scrutiny has shifted from the constitutional infirmities of state statutes (under the Commerce Clause, the Due Process Clause, and the doctrine of intergovernmental immunity), to whether a holding of unconstitutionality must be given retroactive effect, to whether a State may properly deny refunds to taxpayers even after this Court has confirmed that a decision invalidating the statute applies retroactively. Nevertheless, the issue of refunds—of remedy and the practical effect to be given to a taxpayer-favorable decision on the merits—underlay all of the cases.

The specific issue the Petitioner brings to the Court is whether the State of Oregon must refund taxes imposed on federal retirees in violation of the constitutional doctrine of intergovernmental immunity and 4 U.S.C. § 111 (1985). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while exempting all or part of the pensions of state government retirees. In 1993, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct.

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[2] WILLIAM SHAKESPEARE, MACBETH act 3, sc. 2, lines 10-11.

2510, 2513 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—that *Davis* must be applied retroactively by all courts. And last term in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and subsequently declare, after taxpayers have paid the disputed tax, that no such remedy exists. The instant case reprises the question of remedy—a question the Court no doubt thought it resolved nine months ago by declaring in *Reich* that the States may not engage in "bait and switch" tactics. *Reich*, 115 S. Ct. at 550.

Even in *Reich*, however, the question of remedy was not properly viewed as one of first impression. Taxpayers did not sue in *Davis* simply to have the Michigan statute invalidated. They sued for refunds of unconstitutionally collected taxes. Taxpayers did not sue in *Harper* simply to have the Court confirm that the decision in *Davis* applied retroactively in the Commonwealth of Virginia. They sued for refunds of unconstitutionally collected taxes. And taxpayers did not sue in *Reich* simply to have the Court declare that "bait and switch" policies would not be tolerated in Georgia. They sued for refunds of unconstitutionally collected taxes.

Without a remedy, taxpayers' rights are illusory and without regard. Hence, from the outset taxpayers have been seeking the refund of what the States improperly took from them, and the States have said "what's done is done" and sought to retain that which the Court has held they had no right to take in the first instance. That the States have moved from a constitutional argument to a plea for prospectivity to a strained construction of their remedial statutes (and an extraordinarily narrow and pernicious view of the effect to be given to this Court's decisions) should not obscure this basic truth: The States have funds properly belonging to taxpayers. And that basic truth

should impel the grant of a writ of certiorari, the reversal of the court below, and a judgment ordering that a refund be made to the Petitioner.[3]

II.

History is no more than the portrayal of crimes and misfortunes.[4]

The last decade has seen an almost unprecedented number of state taxing statutes struck down as unconstitutional, including the *Davis* decision upending the States' discriminatory scheme of taxing retired federal employees.[5] In many ways these cases are dissimilar. They involved different types of statutes (though with the exception of *Davis*, they all implicated the Commerce Clause rights of interstate businesses). But there are two attributes they generally share. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed (or not imposed to the same extent) on a favored class of tax-

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[3] *See Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."); *accord Reich*, 115 S. Ct. at 550.

[4] VOLTAIRE [FRANÇOIS MARIE AROUET], L'INGÉNU ch. 10 (1767).

[5] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990) (Florida statute exempting local products from liquor excise tax). *See also James B. Beam Distilling Co.*, 501 U.S. at 532 (involving the retroactivity of a case striking down a Georgia statute).

payers (be they domestic businesses or state annuitants). Secondly, each of them triggered the same reaction by one or more of the States that imposed the unconstitutional taxes: an effort to avoid the consequences of their unconstitutional acts, either by applying the Court's holdings on a prospective-only basis or by construing the States' refund statutes to render pyrrhic the taxpayers' constitutional victory. Hence, even after the Court struck down the statutes as contravening the Constitution, some (albeit not all) States resisted efforts to refund the taxes that they had collected under the invalidated laws.

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrongs—was commonly rationalized on equity grounds. Before *Harper,* the States essentially argued that the statutes at issue had been enacted in good faith, that the monies collected under those discriminatory statutes had already been spent, and that the issuance of refunds would threaten the fiscal well-being of the States. In reaching this result, the States generally employed the balancing test set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971), which focused on whether the decision established a new principle of law; whether, based on the history of the rule in question, its purpose, and effect, the nonretroactive application would advance or retard the operation of the new rule; and whether nonretroactive application was necessary to avoid injustice or hardship.

In *Harper,* however, the Court concluded that the *Chevron Oil* framework was too pliant to safeguard the constitutional rights of taxpayers. Experience taught that many States would not apply the test in an even-handed manner, and hence, that the results were neither fair nor defensible. In their quest for revenue, the States transmogrified the *Chevron Oil* test into a standard so malleable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only

basis. The cumulative effect of the States' actions prompted the Court in *Harper* to discard *Chevron Oil* in favor of a more absolute standard that more fully vindicated the rights of taxpayers and better served the goal of certainty. Hence, this Court embraced its earlier statement in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that "[t]he time for toleration has come to an end." *Id.* at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)). *Griffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. And in *Harper*, the Court extended the rule to civil cases, unequivocally holding that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. 113 S. Ct. at 2513. It is this rule of law that the State of Oregon, by its interpretative sleight of hand, has endeavored to eviscerate.

III.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.[6]

Recitation of *Davis* and *Harper* may seem inapt, or unnecessary, in light of the Court's decision last term in *Reich v. Collins*, 115 S. Ct. 547 (1994). In that case, the Court held that a State may not "reconfigure its scheme, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch" later to a cry of inapplicability. Playing "gotcha" with taxpayers is not consonant with due process. States must treat their citizens fairly; they may not lull them into paying a tax—believing that a "clear and certain" post-deprivation remedy exists, in the form of a tax refund

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[6] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

statute—only to declare after those taxes have been paid that no such remedy exists. *See* 115 S. Ct. at 550.

By clearly repudiating the State's "bait and switch" tactics and by ordering "meaningful backward-looking relief" in *Reich*, 115 S. Ct. at 550-51, the Court presumably put *Davis* and its progeny behind it.[7] Such an expectation of calmer waters would not have been unrealistic, given the clarity of *Davis*, *Harper*, and *Reich* and the dictates of the Supremacy Clause. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (it is for the Supreme Court to prescribe constitutional standards, and the lower courts are obliged to adhere to those standards "no matter how misguided the judges of those courts may think [them] to be."); *accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Nevertheless, the Oregon court refused to order a refund to the taxpayer and its refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

To be sure, Oregon's defiance of *Reich* has been veiled. The State did not stand at the door of the revenue department, invoking memories of Orval Faubus and George Wallace. No, it reached its decision in a much more subtle, clever way. The State sought to distinguish *Reich* out of existence.

Like the Georgia law at issue in *Reich*, the Oregon refund statute here is not difficult to read. It plainly states that—

> [I]f a person files a claim for refund of any tax paid to the department under [Oregon's income tax laws] within the period specified in subsection (2), any

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[7] This assumption may well have contributed to the Court's refusal to review other cases involving *Davis*, *Harper*, and *Reich* fact patterns. *See, e.g. Swanson, v. North Carolina*, 115 S. Ct. 662 (1994).

> excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.[8]

The Oregon court facilely held that this provision did not apply, relying instead on an obscure section of the Oregon Code that by its terms applies only "if there is no other statute authorizing refund [of tax]."[9] It distinguished *Reich* by simply noting that the Oregon statute has been the law of the State since 1931. (App. A, 18a.) This feat of legerdemain effectively wiped out almost six decades of precedent.[10] It is precisely the type of reconfiguration—and disingenuousness—that the Court found abhorrent in *Reich*. 115 S. Ct. at 550.

Stated bluntly, like the State in *Reich*, Oregon here endeavors to shoehorn the taxpayer into a refund scheme that, by its very terms, will deny him relief. The court below parsed Oregon's omnibus refund statute and analyzed the other provisions of the Oregon Revised Statutes, not in search of principle or justice, but for a loophole. It sought not to implement the Court's mandate in *Beam*, *Davis*, *Harper*, and *Reich*, but to emasculate it. That the court below's action might pass muster under federal due process principles truly beggars the imagination.[11]

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[8] Or. Rev. Stat. § 305.270(1), *reprinted at* Appendix E to William T. Atkins' Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon (App.) at 33a.

[9] Or. Rev. Stat. § 305.765, *reprinted at* App. E, 41a-42a.

[10] The use of the omnibus refund statute by victims of unconstitutionally levied taxes dates back to the 1930s, *see e.g.*, *Meredith v. State Tax Comm'n*, 96 P.2d 1082 (Ore. 1939), and continued through most of the 1980s, *Borg v. Department of Revenue*, 774 P.2d 1099 (Ore. 1989). The courts' interpretation of the predecessor of section 305.270 of the Oregon statutes has also been embraced for more than five decades by the State's Attorney General. Opinion of the Attorney General, January 24, 1940 (App. F, 43a).

[11] *See McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the un-

Oregon's refusal to give weight to the decision in *Reich* can be instructively compared with the Virginia Supreme Court's analysis of the same decision in *Harper v. Virginia Dep't of Taxation*, No. 940326 (Va. S. Ct. Sept. 15, 1995) (*Harper III* [12]). After this Court's 1993 decision in *Harper*, the case was remanded to the Virginia courts "to provide relief consistent with federal due process principles." *Harper*, 113 S. Ct. at 2519 (*quoting American Trucking Ass'ns v. Smith*, 496 U.S. 167, 181 (1990)). The Virginia Department of Taxation argued that the Commonwealth's declaratory judgment proceeding satisfied the demands of due process and hence that Virginia was not required to provide any backward-looking relief in the form of refunds, and it persisted in this argument even after the decision in *Reich*. Indeed, the Department averred before the Virginia Supreme Court that *Reich* was inapplicable, baldly claiming that "[n]o reasonable taxpayer can claim he was misled by the clear and unequivocal language of [Virginia's] discretionary [refund] statute." *Harper III*, slip op. at 11.

The Virginia Supreme Court, however, refused to be a party to the Department's effort to minimize the decision in *Reich*. Hence, the court held:

> If . . . we now adopt, for the first time, the Department's view that a refund is discretionary, we certainly will have done what the Supreme Court said

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lawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (*quoting Ward v. Board of Comm'rs of Love County*, 253 U.S. 17, 24 (1920)).

[12] The Virginia Supreme Court's September 15, 1995, decision is hereinafter denominated "*Harper III*" in recognition of that court's labeling of this Court's 1993 decision as "*Harper II*" and its 1991 summary disposition of the case in light of the decision in *Beam* as "*Harper I*." *See Harper v. Virginia Dep't of Taxation*, 501 U.S. 1247 (1991). Throughout this brief, the Court's 1993 decision on the merits is referred to as "*Harper*."

> in *Reich* a state may *not* do, that is "to reconfigure its scheme, unfairly, in *midcourse*—to 'bait and switch.' "

Slip op. at 11 (*quoting Reich*, 115 S. Ct. at 550) (emphasis added by Virginia Supreme Court).[13] The court similarly rejected the Department's attempt to deny refunds on the grounds that adequate predeprivation remedies existed. Finding that "no reasonable taxpayer would have thought that . . . [any such procedures] represented the exclusive remedy," the court held that their existence (even if constitutionally adequate) would be " 'entirely beside the point (and thus error).' " *Id.* at 15-16 (*quoting Reich*, 115 S. Ct. at 550). Hence, the Virginia Supreme Court concluded:

> Giving *Reich* its full effect, we reach the inevitable conclusion that the *Harper* taxpayers are entitled to full refunds.

Id. at 17.

The parallels between the Virginia Department of Taxation's actions in *Harper III* and State of Oregon's actions here are striking. The difference, however, is that whereas Oregon's resistance continues unabated, in Virginia the third time was the charm. After denying the constitutional necessity of refunds in the aftermath of *Davis* and *Harper*, the Virginia Supreme Court in *Harper III* interpreted *Reich* as this Court intended: as an unmistakable signal to end beguiling games of semantics and to give full effect to this Court's decisions. It is a signal the State of Oregon still refuses to heed.

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[13] The Department of Taxation argued that the interpretation of the refund statute it was propounding was not new. The court, however, found unpersuasive the Department's efforts to distinguish away a 1916 case that interpreted similar language as *mandating*, rather than simply authorizing, the refund of illegally collected taxes. Slip op. at 11-15 (interpreting the word "may" in the tax refund statute as mandatory is necessary "[t]o avoid doing what *Reich* teaches a state may not do").

IV.

> *There simply is nothing "inequitable" or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so.*[14]

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 1995 U.S. LEXIS 4049, at *7 (U.S. June 19, 1995) ("principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."). *Reich* stands for the proposition, however, that the States' remedial discretion is not unfettered, especially where that discretion has been repeatedly abused. History is irrefutable: In the past decade, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In *The Federalist No. 80*, Alexander Hamilton used the example of claims to land under grants of different States to underscore the need for diversity jurisdiction:

> The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the

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[14] *Swanson v. North Carolina*, 407 S.E.2d 791, 797 (N. C. 1991) (Mitchell, J., dissenting).

> judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST No. 80 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

> The constitution has presumed (whether rightly or wrongly, we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.[15]

See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948) (diversity jurisdiction was the product in part of "[t]he desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.").

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here.[16] Nevertheless, the principle remains the same: The Court "cannot leave to the States the formulation of the authoritative laws, rules, *and remedies designed to protect people from infractions by the States of federally*

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[15] *See* THE FEDERALIST No. 81 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION, *supra*, 483, 487-88 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . .").

[16] Indeed, although many of the cases coming before the Court in recent years have involved the Commerce Clause rights of out-of-state businesses, here it is the citizens of the State—albeit ones formerly employed by the Federal Government—who are denied their rights.

guaranteed rights." Chapman v. California, 386 U.S. 18, 21 (1967) (emphasis added).

It is time for the Court to end its willing suspension of disbelief concerning the States' ability and willingness to flout the constitutional rights of taxpayers. For far too long, State after State has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the constitutional rights of taxpayers. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State should not be allowed to argue first that the decision should apply on a prospective-only basis, and then (when that argument fails under *Beam* and *Harper*) insist that, though retroactive, the decision does not necessitate refunds (even where *Reich* mandates otherwise). The States should not be permitted to thwart the judgments of this Court by conjuring up one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance. Unless the Court orders meaningful relief in this and similar cases, the States will continue to have an incentive to enact unconstitutional statutes—to "roll the dice" with the constitutional rights of taxpayers, knowing that—at worst—they may have to mend their ways in the future.[17] Indeed,

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[17] That the States' approach in the cases invalidating state taxing schemes is driven more by their desire to avoid responsibility for their unconstitutional acts than by a reasonable interpretation of this Court's decisions is perhaps best illustrated by a case in which the roles of taxpayers and the States on the retroactivity issue were reversed from what they typically have been. In *Allied-Signal, Inc. v. Director, Div. of Taxation,* 504 U.S. 768 (1992), the Court considered whether two earlier decisions—*ASARCO Inc. v. Idaho State Tax Comm'n,* 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't,* 458 U.S. 354 (1982)—should be overruled. Had those cases been overturned, the States would have been free to tax a larger share of the income of out-of-state busi-

allowing Oregon's defiance of *Harper* and *Reich* to stand here could jeopardize the integrity of the certiorari process, by encouraging States to disregard decisions they disagree with in the knowledge that the odds are high against this Court's reviewing the decision. That such an outcome cannot be lightly dismissed is underscored by Oregon's seemingly flippant decision not to respond to the Petition.

V.

The time for toleration has come to an end.[18]

There has been much discussion of late of the public's distrust of government and its doubts about its role, abilities, and basic integrity. Some trace the people's cynicism of government's trustworthiness to the Vietnam War and the arrogance of power that was documented in the Penta-

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nesses, and the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875)—and notwithstanding the States' almost uniform resistance to retroactive holdings where taxing schemes have been invalidated—29 States, the District of Columbia, Guam, and the Virgin Islands filed a brief unabashedly arguing that "the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity." *See* Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992) (No. 91-615) at 16. Such an "accommodation," however, which some States seem ready to carry over to the issue of remedy, seems completely untethered by principle or consistency. As the Fifth Circuit observed in *Kurzner v. United States*, 413 F.2d 97, 112 (5th Cir. 1969), "the courts have not yet become so cynical as to subscribe to the tax-dollar school of statutory construction."

[18] *Griffith v. Kentucky*, 479 U.S. at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

gon Papers, which came before the Court in *New York Times Co. v. United States*, 403 U.S. 713 (1971). Others point to the Watergate crisis, and to the excesses that the legal process was called to judge in *United States v. Nixon*, 418 U.S. 683 (1974). More recently, some have focused on a courtroom in Los Angeles where the law seems twisted out of shape; they listen to tapes—not at all like those at issue in *United States v. Nixon* but nevertheless involving a person sworn to uphold the Constitution—and they hear documented the violation of that sacred oath.

There are no tapes here, no smoking gun. There are just the actions of a series of state courts interposing their own will and denying what is due to a class of citizens unconnected by anything but service to their government. There are just beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate this Court's mandates. The States' actions, however, cannot help but undermine the people's trust in government and the spirit of fair play, no matter how prettily they are wrapped. Like the Emperor in Hans Christian Andersen's fairy tale, the nakedness—and arrogance—of their actions has been exposed for all to see. It should now be stopped.

This case, then, is about more than Petitioner's entitlement to the tax dollars the State of Oregon illegally exacted from him. It is about the legitimacy and vitality of this Court's decisions. To be sure, the States may pay lip service to *Davis*, *Harper*, and *Reich*, but in reality they have shown a brazen disregard for the Supremacy Clause, and an unbending willingness to thwart the directives of this Court and undermine the protections of the Constitution:

- They disagreed with *Davis* and so they undertook to stymie its effect.
- They disagreed with *Harper* and so they undertook to circumscribe it.

- They disagreed with *Reich* and so they undertook to ignore it.

No longer should their defiance of the Court's mandates be countenanced. It is time for this Court to say, *Enough is enough*. It is time to reject the States' massive resistance, their effort to treat taxpayers' constitutional rights as unwelcome guests at a dinner party, thinking that if they simply ignore them, they will go away. It is time to say, once again, that the time for toleration has come to an end.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the decision of the Supreme Court of Oregon, and order the State to refund the monies it unconstitutionally extracted from the Petitioner.

Respectfully submitted,

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Supreme Court, U.S.
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No. 95-279

(4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully invites the Court's attention to the Virginia Supreme Court's decision in *Harper v. Virginia Dep't of Taxation*, —— Va. ——, —— S.E.2d ——, 1995 WL 545828 (Sept. 15, 1995) (*"Harper III"*). The decision *in Harper III* underscores that the decision of the Oregon Supreme Court in the case at bar is in irreconcilable conflict with this Court's decision in *Reich v. Collins*, 115 S. Ct. 547 (1994). Unlike the court below, the Virginia Supreme Court rejected the Virginia Department of Taxation's assertion that "*Reich* is *inapplicable* here." *Harper III*, 1995 WL 545828, *4 (empha-

sis added).[1] Consistent with this Court's holding in *Reich*, the Virginia Supreme Court held that:

> If . . . we now adopt, for the first time, the Department's view that a refund is discretionary, we certainly will have done what the Supreme Court said in *Reich* a state may not do, that is "to reconfigure its scheme, unfairly, in midcourse—to 'bait and switch'."

Id. (*quoting Reich*, 115 S. Ct. at 550). The Oregon Supreme Court's adoption of the respondent's reconfigured scheme indisputably violated its obligation under the Supremacy Clause to give "*Reich* its full effect." *Id.* at *8.

The Virginia Supreme Court's decision in *Harper III* also establishes the widening conflict between the State courts of last resort. In *Harper III*, the Virginia Supreme Court properly reached the "inevitable conclusion that the Harper taxpayers are entitled to full refunds. *Harper III*, 1995 WL 545828, *8. In contrast, the court below, in order to avoid this inevitable result, defiantly chose instead to ignore the mandate of *Reich*.[2] Thus, review is necessary to resolve this conflict between the courts of last resort on this important federal question.

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[1] The position of the respondent adopted by the court below and and now replicated by the respondent in other pending *Davis*-related cases in Oregon is indistinguishable from that asserted by the Virginia Department of Taxation in *Harper III*. *See, e.g.*, Petition at 9.

[2] *See also General Motors Corp. v. Kansas City, Missouri*, U.S. No. 95-125 (petition for certiorari filed July 21, 1995).

CONCLUSION

For the reasons set forth above and in the petition for certiorari, Petitioner respectfully requests that his petition for certiorari be granted and the decision of the court below be reversed.

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OPPOSITION

BRIEF

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DEPARTMENT OF REVENUE,
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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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QUESTIONS PRESENTED

1. Whether, under *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), a State, through a pre-existing statute, may impose a one-year period of limitations on its liability to pay backward-looking relief for an unconstitutionally imposed tax.

2. Whether a State denies taxpayers due process where: (1) state law contains two arguably applicable statutes providing for refunds of taxes, one of which would provide retroactive relief for a one-year period and the other for a three-year period; (2) the state courts had not previously had the opportunity to declare which of the two arguably applicable limitations periods would apply to a particular class of claims; (3) the state court holds that the shorter of the two periods applies; and (4) the taxpayers cannot reasonably claim that they relied to their detriment on the more generous statute, because their reliance on the statute did not deprive them of the pre-existing remedy that applies to their claim.

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RESPONDENT'S BRIEF IN OPPOSITION

As many other States did for many years, Oregon taxed pensions paid to retired federal workers but exempted pensions paid to retired state workers. And in Oregon, as in many other States, this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), spawned litigation by federal retirees seeking refunds of taxes paid in the years in which state retirees were exempt. The first case challenging that differential taxation to reach the Oregon Supreme Court was *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992).[1] The state court resolved *Ragsdale* by striking down the state tax statute and applying a longstanding Oregon statute that imposes a one-year period of limitations for refund of taxes in cases in which tax laws are invalidated by the courts. The court reexamined and reaffirmed that decision in the case of which petitioner seeks review.

Petitioner asserts two main arguments against these two state court opinions. First, petitioner claims that the Oregon decisions fail to apply *Davis* retroactively as required by *Harper v. Virginia Dep't of Revenue and Fin.*, 509 U.S. ___, 113 S. Ct. 2510 (1993). That argument is based on misunderstandings both of *Harper* and of the operation of the statute the Oregon court applied in *Ragsdale*. The statute the state court applied is of a type this Court expressly approved in *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 31 (1990), and itself provides backward-looking relief. Second, petitioner argues that the state court opinions lead to a result no different from the "bait and switch" tactic this Court condemned in *Reich v. Collins*, 513

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[1] An earlier case, *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), failed to obtain substantive review of the question of remedy for federal retirees because the plaintiffs had bypassed available administrative review by the Department of Revenue.

U.S. ___, 115 S. Ct. 547 (1994) (*Reich III*).[2] Once again, petitioner misreads both this Court's opinion and the effects of Oregon law. The Court did not hold that a taxpayer's due process rights are violated any time the taxpayer does not obtain as large a refund as he expected based on his reading of state law. What the Court rejected was causing taxpayers to pass up an available remedy in justified reliance on the existence of an alternative route to that same refund, then closing that alternative route and leaving the taxpayer with no refund at all. Nothing like that happened here. To the contrary, Oregon awarded significant relief to a large class of federal retirees, including petitioner.

Because the state court's decision in this case is based on *Ragsdale* and because the petition for writ of certiorari consists in large measure of an attack on that opinion, the Department of Revenue (DOR) begins with a somewhat more complete description of the facts and reasoning of that opinion than petitioner has provided.[3] DOR then explains why the relief ordered in *Ragsdale* is fully consistent with due process and with *Harper* and not remotely analogous to the denial of relief rejected in *Reich III*.

1. The plaintiff in *Ragsdale* sought refund of back taxes paid for 19 years on her federal pension on the theory that the due process requirement of "meaningful backward-looking relief,"

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[2]This brief refers to all three *Reich v. Collins* opinions, two from the Georgia courts, *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846, 849 (1992) (*Reich I*) and *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) (*Reich II*), as well as this Court's opinion, *Reich v. Collins*, 513 U.S. ___, 115 S. Ct. 547 (1994) (*Reich III*).

[3]Other than the *Ragsdale* opinion itself, the best guide to what the Oregon Supreme Court did in *Ragsdale* and why, is the court's painstaking opinion in this case, Pet. Cert. 1a–18a, which thoroughly reconsiders and reexamines the history and analysis applied in *Ragsdale*.

McKesson, 496 U.S., at 31, mandated refund of all taxes ever paid under the invalid state law. Alternatively, she sought refund of back taxes paid for three years under OR. REV. STAT. §§ 305.270 and 314.415, Oregon's general refund statutes. DOR responded there, as it did here, that *McKesson* expressly approves restrictions on state refund obligations imposed by pre-existing procedural requirements, such as short statutes of limitations, and that Oregon has had just such a restriction for as long as it has had the general refund statutes on which the taxpayer relied. That restriction is found in OR. REV. STAT. §§ 305.765 through 305.785, which govern refunds of taxes when a tax law is declared invalid.[4] OR. REV. STAT. § 305.765 expressly provides that when a tax law is declared invalid, the state shall refund taxes paid or collected under the invalidated law in and after the year in which the action attacking the validity of the law is initiated. OR. REV. STAT. § 305.780 expressly declares that these sections do not authorize refund of any taxes paid under the invalidated law in years prior to the year in which the action attacking the invalidated law is initiated. The plaintiff in *Ragsdale* argued, as does petitioner, that OR. REV. STAT. § 305.765, by its terms, applies only when "there is no other statute authorizing a refund" of the taxes in question. Because the general refund statute authorized a refund, they reasoned, OR. REV. STAT. § 305.765 could not apply.[5]

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[4]OR. REV. STAT. §§ 305.765 through 305.780 are found at pages 41a and 42a of the petition for certiorari. OR. REV. STAT. § 305.785 appropriates funds to pay the refunds ordered by those sections.

[5]DOR refers to OR. REV. STAT. §§ 305.270 and 314.415 as the "general refund statutes" and to OR. REV. STAT. §§ 305.765 through 305.785 as the "invalidation refund statutes." In a sense, though, it might be more precise to describe the invalidation statutes as simply providing a remedy for an

(continued...)

The Oregon Supreme Court held that the invalidation refund statutes, not the general refund statutes, applied. As it did in this case, the court traced the history of the two sets of laws, explaining that their predecessors were enacted by the 1931 Oregon Legislature in response to a pointed historic lesson. In 1930, the Oregon Supreme Court struck down a state tax on intangibles. *Redfield v. Fisher*, 135 Or. 180, 204, 292 P. 813 (1930). The tax commission asked the Attorney General about its liability to refund revenue collected under the invalid tax. The Attorney General advised that refunds could be made only under a provision of the law that authorized the Commission to retain $1,000 as a working balance from which to make refunds of amounts paid by taxpayers in excess of the taxes they were legally required to pay. 15 Op. Att'y Gen. 34 (1930); 15 Op. Att'y Gen. 35 (1930). The 1931 Legislative Assembly responded by enacting, *inter alia*, Oregon Laws 1931, ch. 229 (the precursor to OR. REV. STAT. §§ 305.270 and 314.415, the general refund statutes) and Oregon Laws 1931, ch. 337 (which became what are now OR. REV. STAT. §§ 305.765 to 305.785, the invalidation refund statutes).[6]

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[5](...continued)

invalid statute rather than to characterize that remedy as a refund. As described in the text, the remedy differs from a standard refund in that taxpayers are not required to apply to receive the return of taxes paid once the court of last resort determines that the tax is invalid.

[6]Petitioner takes unspecific issue with this history, claiming that a 1940 Opinion of the Attorney General demonstrates that it "simply is not so[.]" Pet. Cert. 18, citing 19 Op. Att'y Gen. 577 (1940) (reproduced at Pet. Cert. 43a through 46a). Petitioner is demonstrably wrong. The opinion he cites was issued in response to *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939), upon which petitioner also relies. In *Meredith*, however, the Oregon Supreme Court was not called upon to declare any tax law invalid and did not do so. Rather, the court concluded that the State Tax

(continued...)

Relying on this history and on the principle that a court should not read a general statute so broadly that it will nullify a more specific statute enacted in the same legislative session, *Daly v. Horsefly Irrigation District*, 143 Or. 441, 446, 21 P.2d 787 (1933), the *Ragsdale* court concluded that the general refund statutes cannot apply when a tax law is invalidated. *Ragsdale*, 312 Or., at 536–37. The court reasoned that if the general refund statutes apply when a tax law is invalidated, "it would have been unnecessary to enact what is now [OR. REV. STAT. §] 305.765" because the general refund statute would *always* apply and there would never be a situation in which "there is no other statute authorizing a refund." 312 Or., at 537. The court concluded that excluding the contemporaneously enacted general refund statutes from the meaning of this limitation on the invalidation refund statutes is the only reading that permits the invalidation refund statutes to have effect. *Ibid.* The court re-examined and reaffirmed that history and that analysis in this case. Pet. Cert. 6a–12a.[7]

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[6](...continued)

Commission, the predecessor to DOR, erroneously construed a state statute and therefore erroneously failed to exempt income from the tax. 163 Or., at 310–13. When the Attorney General opined that "[b]ecause of [their] limited application [the invalidation refund statutes do] not seem material in this connection," Pet. Cert. 43a–44a, he was noting only that no law had been invalidated in *Meredith*.

[7]Petitioner disregards this bedrock principle of statutory construction. He asserts that the Oregon court reached its result by "ignoring the express provisions of [the general refund statute]" and omitting the provision of the invalidation refund statute that states that it applies only when no other statute provides for a refund. Pet. Cert. 17. To the contrary, as demonstrated in the text, *Ragsdale* expressly considered the language of both statutes and harmonized them to give effect to both. The court did the same here. *Atkins*, 320 Or., at 722–23 (Pet. Cert. 11a–12a). To suggest that the court simply ignored any of the language of either statute is convenient to

(continued...)

The *Ragsdale* court then turned to the portion of the statute requiring refunds for all taxes collected or paid under the invalidated statute "in or after the year in which the action attacking the validity of the [statute] is instituted." DOR argued that since Mrs. Ragsdale had not commenced her action in the Tax Court until 1990, she could not claim a refund of taxes paid in 1988 or 1989. The Oregon Supreme Court disagreed on two grounds. First, the court noted that in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), it held that the taxpayer must first pursue a refund from DOR before filing in the tax court. Reasoning that requiring initial resort to DOR gives DOR rather than the taxpayer control over the date that judicial action may be initiated, the court concluded that the limitations period in OR. REV. STAT. § 305.765 commences when the taxpayer initiates the administrative proceeding. 312 Or., at 538. Second, the court pointed out that Mrs. Ragsdale's 1988 taxes were not due to be paid until April 15, 1989. Her initiation of the administrative process in

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[7](...continued)

petitioner's thesis, but plainly inaccurate.

The court's reasoning also refutes the alternative effort to harmonize the two statutes offered by amicus The Retired Officers Association (TROA) . TROA argues that the invalidation refund statutes may be read to provide refunds to those taxpayers who failed to apply under the general refund statutes within the period of limitations. TROA Am. Br. at 6-7. That reading might be plausible if OR. REV. STAT. § 305.765 were written in terms addressed to individual taxpayers who no longer had a remedy. The pertinent language, however, refers to the absence of another statute authorizing a refund. The general refund statutes authorize refunds. That a taxpayer does not timely apply does not mean that "there is no other statute authorizing a refund." TROA's reading would also lead to disparate results, with some taxpayers receiving refund of three years' taxes and others only one. The Oregon Supreme Court's construction, in addition to being consistent with the language of the law, provides results consistent with the class-type relief mandated by the invalidation refund statutes.

1989 therefore entitled her to a refund of the 1988 taxes on her federal pension. Refund of her 1989 taxes followed from the statute's requirement to return taxes paid "in *or after*" the year in which the action is begun. The court also concluded that because the invalidation refund statutes themselves provide backward-looking relief, the court was not required to decide whether federal law required *Davis* to be applied retroactively. 312 Or., at 533-34.[8]

The plaintiff in *Ragsdale* was not the only federal retiree to benefit from the court's holding. The invalidation refund statutes put the burden on the State to identify everyone who paid the tax under the invalidated statute and to refund any tax paid or collected during or after the year in which the invalidating action was filed. OR. REV. STAT. § 305.770. In contrast, the general refund statutes require the taxpayer to take the initiative and file for a refund. Because the invalidation refund statutes provide a form of class relief to all taxpayers who paid under the invalidated law, DOR issued over 58,000 refunds totalling more than $48,000,000 to federal retirees for the taxes paid on their pensions in 1988 and 1989.

2. Petitioner argues that Oregon has refused to give "full retroactive effect" to *Davis* in violation of the Court's later decision in *Harper*. In *Harper*, as it had done in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), the Court held that when it applies a rule of federal law to the parties before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless

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[8]This Court decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), which affected the rules by which retroactivity of the Court's decisions is determined, while *Ragsdale* was under review.

whether those events predate or postdate our announcement of the rule." *Harper*, 113 S. Ct., at 2517. The Virginia court had concluded that it should apply the rule of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), because this Court had not expressly stated in *Davis* that the rule it announced applied retroactively to the parties to that case. The Court disagreed and stated that when it does not expressly reserve the question of retroactivity, its opinions, *Davis* included, should be understood to have followed "'the normal rule of retroactive application.'" *Harper*, 113 S. Ct., at 2518 *quoting Beam*, 111 S. Ct., at 2445 (opinion of Souter, J.).

Harper unambiguously establishes that state courts must give the substantive rule announced in *Davis* full retroactive effect. It does not, however, determine the remedy that a State must afford for that violation of federal law. The Court in *Harper* declined to order any specific remedy but, rather, remanded to the state courts to fashion a remedy consistent with the due process principles it had most recently described in *McKesson*. *Harper*, 115 S. Ct., at 2519–20.

McKesson holds that States may protect themselves against the potentially disastrous economic consequences of having to refund all the money ever collected under an invalidated tax law. To be sure, due process requires States to provide meaningful backward-looking relief if they do not provide a predeprivation opportunity to avoid paying disputed taxes. *McKesson*, 496 U.S., at 36–39. But due process also permits States to enact reasonable procedural limitations on refund actions, so long as those limitations precede the invalidation of the law. In *McKesson*, the Court interpreted a part of the Florida court's reasons for its refusal to provide a remedy for taxes already paid as "bespeak[ing] a concern that a State's obligation to provide

refunds for what later turns out to be an unconstitutional tax would undermine that State's ability to engage in sound fiscal planning." 496 U.S., at 44. This Court responded by explaining that States could protect themselves from the potentially devastating effects of having a broadly applicable tax law invalidated by imposing reasonable "procedural requirements on actions for postdeprivation relief[.]" *Id.*, at 45; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. ___, 115 S. Ct. 1745, 1750 (1995) (explaining application of *McKesson* to pre-existing, separate, independent remedial rules). Among the procedural requirements *McKesson* specifically enumerated as within a State's ability to enforce consistent with the requirements of due process are "relatively short statutes of limitations applicable to such actions[.]" *McKesson*, 496 U.S., at 44. That is precisely what the Oregon legislature created in 1931 when it enacted the invalidation refund statutes which impose a one-year period of limitations on refund claims arising from the invalidation of a tax law. As the Oregon Supreme Court explained: "If an action attacking the validity of the tax is not instituted within the year following its assessment (*viz.*, the year in which it is due and payable in this case), no refund may be made." *Atkins v. Dept. of Rev.*, 320 Or. 713, 726, 894 P.2d 449 (1995) (Pet. Cert. 16a). Petitioner's persistent references to "*novelty* in procedural requirements," *e.g.*, Pet. Cert. 9 (emphasis by petitioner), are, thus, persistently wide of the mark. Oregon has simply applied a longstanding statute of the type that this Court expressly approved in *McKesson*.[9]

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[9]The amicus brief of Tax Executives Institute (TEI) has more literary than legal merit. The brief is, in Macaulay's words, "all sail and no anchor." Letter to H.S. Randall (May 23, 1857). For example, TEI pretends

(continued...)

Petitioner incorrectly claims that the Court "specifically identified the court below as one of several state courts that had 'refused to accord full retroactive effect to *Davis* as a controlling statement of federal law.'" *See* Pet. Cert. 3; Pet. Cert. i (Question Presented No. 1). In the footnote accompanying the statement petitioner quotes, *Harper* cites the decision of the Oregon *Tax Court* as having declined to apply *Davis* retroactively. 113 S. Ct., at 2515 n 6 *citing* "*Ragsdale v. Department of Revenue*, 11 Or. Tax 440 (1990) aff'd on other grounds, 312 Or. 529, 823 P.2d 971 (1992)." In fact, the Oregon Supreme Court's decision affirmed the tax court in part and reversed it in part. *Ragsdale*, 312 Or., at 542. As previously described, the Oregon Supreme Court ordered retroactive relief under OR. REV. STAT. § 305.765 without waiting to be told that *Davis* applied retroactively.

Petitioner also argues that the decision in this case conflicts with a decision of the Florida Supreme Court. Pet. Cert. 9–10. That is a remarkable assertion inasmuch as the Florida court obviously was not interpreting the Oregon statutes at issue here. Rather, the court was considering the State of Florida's appeal from a trial court decision holding that a state tax on motor vehicles purchased outside of Florida violated the federal constitution. The State argued that applicable refund statutes barred the action. With little analysis, the Florida court concluded that the reasons proffered by the State provided no basis on which to bar a federal constitutional claim. *Department of*

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[9](...continued)

that no refunds were actually paid to petitioner and other federal retirees under *Ragsdale* and ignores those parts of *McKesson* that address the ability of the states to protect themselves against the crushing economic burden of having to refund all tax money ever collected under a broad scale tax law invalidated after many years application.

Revenue v. Kuhnlein, 646 So.2d 717, 721 (Fla. 1994). It is not clear from the court's opinion whether it was holding that the reasons presented by the State could not bar an action to declare the tax invalid or could not bar the remedy the taxpayers sought. If the court was addressing the former, there is no conflict because neither DOR nor the Oregon Supreme Court denies that the substantive rule announced in *Davis* and applied in *Harper* applies with equal force to Oregon.[10] As discussed above, the issue here is the remedy to be provided. If *Kuhnlein* is read as holding that a State may not apply pre-existing procedural rules that limit the relief afforded once a tax statute is declared unconstitutional, it is incorrect.

3. Petitioner's central thesis is that what the Oregon court did here is essentially indistinguishable from what the Georgia court did in its two *Reich* cases. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846, 849 (1992) (*Reich I*) and *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) (*Reich II*). *See* Pet. Cert. 8–9, 12–19. Petitioner claims, in effect, that to protect the state treasury, the Oregon court created a new rule to foreclose taxpayers from receiving their just due. That claim fails whether one compares what the Georgia and Oregon courts actually did or the results for the affected taxpayers. Where the Georgia court simply rewrote a statute out of concern about the economic consequences of applying it as written, the Oregon court applied a pre-existing and controlling statute after careful examination of the text, context and history of both the general refund statutes

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[10]Petitioner mischaracterizes a trial memorandum when he asserts that Oregon does not view itself as bound by this Court's decisions. Pet. Cert. 9. The portion of the memorandum he quotes makes the unremarkable assertion that Oregon trial courts are bound by the decisions of the Oregon Supreme Court.

and the invalidation refund statutes. Where Georgia taxpayers were misled into foregoing available process and thereby deprived of any remedy, no Oregon taxpayer gave up or was led to bypass either the process or the remedy to which he or she was entitled.

The Georgia court's *ipse dixit* conclusion that the state refund statute did not apply when a tax law was invalidated was not based on an alternative governing statute, on the history of the refund statute or on any principle of law or of statutory construction. Rather, as the opinion makes clear, the court based its result on its concern that, to promote stable government, the State needs to be able to rely on the laws under which it collects taxes. *Reich I*, 422 S.E.2d, at 849. In other words, the court judicially amended the statute to prevent the economic consequences of having to refund the taxes collected under the invalidated statute.

This Court's cases stand for the proposition that while States legitimately may protect themselves from the financial consequences of the invalidation of a tax statute, they must do so before the statute is struck down. This Court acknowledged in *McKesson* that preventing the economic disruption that might follow from the need to refund all money ever collected under an invalidated tax law is a matter of legitimate governmental concern. *McKesson*, 496 U.S., at 50. It is, however, a concern that the State must address prospectively. *Id.*, at 45; *id.*, at 28 n.4 (State may invoke, as an independent basis for refusing to provide a refund, failure to comply with a notice requirement "that was in effect at the time of petitioner's tax payments."); *Reynoldsville Casket Co.*, 115 S. Ct., at 1750 (explaining *McKesson*'s application to "pre-existing" remedial limitations). A State may, as Oregon did, create a protective rule that applies to cases arising after its enactment; it may not, as Georgia

attempted to do, create such a rule only after the tax law has been found invalid. In 1931 the Oregon legislature created a protective limitation precisely of the sort approved in *McKesson*. In 1992 the Oregon Supreme Court applied that limitation according to its terms. The Georgia court, by contrast, attempted to fashion its protective rule only after the fact. The actions of the two courts are not comparable.

When viewed from the perspective of its results for the affected taxpayers, the Oregon court's action is, again, dramatically different from the result in Georgia. Simply put, unlike what occurred in Georgia, no Oregon taxpayer changed his or her position for the worse in reliance on allegedly misleading information from the State. As the Court has explained, when the question is payment of taxes, a State may provide only predeprivation process to challenge a tax, only postdeprivation process, or both. *Reich III*, 115 S. Ct., at 550. Before the decision in *Reich I*, Georgia appeared to hold out to its taxpayers a hybrid system that gave them an unrestricted choice between challenging the tax before paying (predeprivation) or paying first, then challenging afterwards (postdeprivation). *See Reich III*, 115 S. Ct., at 550. As the Court also explained, States generally encourage taxpayers to pay first and litigate later. *Id.*, at 551. In *Reich I*, however, the Georgia court concluded that the postdeprivation process was not available where the claim was that the statute under which the tax had been collected was invalid. 422 S.E.2d, at 849. The result was to remit those taxpayers who had accepted the invitation to use the postdeprivation remedy to a predeprivation process that was no longer available to them because they had already paid the tax. Thus, those taxpayers who justifiably relied on the availability of postdeprivation process could obtain no remedy at all. As this Court explained, the

interaction of the Georgia court's two decisions denied both process and remedy to those taxpayers who had foregone the predeprivation procedure in justified reliance on the availability of a postdeprivation claim. 115 S. Ct., at 550–51.[11]

The Court's reference to "bait and switch" tactics and its use of the phrase "justified reliance" in *Reich III*, the latter of which was taken from Justice Harlan's opinion in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958), suggest, as does the result reached by the Court in both cases, principles of equitable estoppel. That suggestion is underlined by the Court's description of Georgia's actions as reconfiguring its remedial scheme "unfairly, in *midcourse*[.]" *Reich III*, 115 S. Ct., at 550 (emphasis by the Court). In effect, the Court concluded that having led taxpayers to believe that they would be entitled to seek postdeprivation relief, the State could not then deny that relief to a taxpayer who may have "change[d] his position for the worse" in reliance on the representation that postdeprivation relief would be afforded. *See Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984) (describing elements of equitable estoppel). The essence of estoppel is that the person asserting the estoppel has been deprived of something to which she could lay a legitimate claim (the predeprivation remedy) by another's false

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[11]State and federal law create a host of situations in which a litigant is confronted with a procedural fork in the road and must make the choice of which fork to take at his or her peril. In most of those cases, that litigant is on notice that taking the right path is critical to succeeding. That litigants must sometimes take a calculated risk in selecting between, for example, a tort action or an administrative remedy does not give rise to a due process violation if the courts later clarify the law and announce that the litigant made the wrong choice. Nor was that the source of the problem in *Reich III*. The Georgia court's decisions failed to provide due process because, *inter alia*, no reasonable taxpayer could have been on notice before *Reich I* that the choice between predeprivation and postdeprivation relief was significant in terms of the ultimate ability to obtain a refund.

representation (the availability of the postdeprivation remedy).[12] Those Georgia taxpayers who passed up the predeprivation process in justified reliance on the availability of the post-deprivation process were left with no process and, hence, no remedy. Although the Court relied on due process rather than estoppel principles, the similarity of reasoning is apparent.

Petitioner is unspecific about how he or any other taxpayer in Oregon was or could have been misled into changing his or her position for the worse in reliance upon the belief that the general refund statute would apply here. That is understandable because, unlike the situation presented in *Reich III*, the choice of which refund procedure to pursue did not cause any taxpayer to change his or her position in a way that deprived that taxpayer of either a process or a remedy to which he or she was otherwise entitled.

There are only two ways in which reliance on the general refund statute theoretically could have caused petitioner to change his position for the worse here. First, as in *Reich III*, the taxpayer could have bypassed available predeprivation relief and found himself effectively denied a greater remedy than was awarded by the *Ragsdale* decision. Second, the taxpayer could have delayed filing for a refund in reliance on the three-year period of limitations in the general refund statutes.

Neither of those results occurred here. First, Oregon has no predeprivation remedy. To obtain judicial review, the taxpayer must pay the tax. OR. REV. STAT. § 305.419; *Atkins v. Depart-*

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[12]The point is not, as TROA apparently believes, that a State violates the principles described in *Reich III* unless the average taxpayer can understand all the intricacies of the tax code. *See* TROA Am. Br. at 6–7. It is, rather, that the state may not mislead that taxpayer into giving up that to which he or she would have been entitled if not misinformed.

ment of Revenue, 320 Or., at 725–26 (Pet. Cert. 15a). As a result, no one bypassed an available predeprivation remedy (or any other purportedly available remedy) in reliance on what later proved to be a mirage. The second possibility is, as a practical matter, highly unlikely. Where a taxpayer has paid taxes for several years under a statute that he now claims is invalid, the existence of any period of limitations, whether it be one year or three, places a premium on filing at the earliest possible date. If petitioner had reason to believe that he was entitled to a refund of taxes paid on his federal pension and if, as reason and his pursuit of this litigation suggest, his motive was to maximize his refund, he had precisely the same incentive to file at the earliest possible date no matter what limitation period he may have thought was applicable. In either case, to maximize his refund he must file at the earliest possible date. Similarly, if the taxpayer is seeking to invalidate a statute, he must also file at the earliest date to limit his future liability to pay the tax. Thus, petitioner could not credibly contend that he delayed filing for a refund in reliance on a mistaken belief that the longer period of limitations applied.

The truth, of course, is that petitioner claims none of the above. His complaint is simply that he thought he was entitled to get a refund under the longer period of limitations and *Ragsdale* holds that he is not. To be sure, that holding made his refund smaller than he wishes it had been. That, however, is hardly a violation of due process. It is simply the application of a controlling statute in the manner in which it was designed to be

applied.[13] The State did not cause petitioner to change his position for the worse in reliance on some apparently available remedy, then unforeseeably snatch that remedy away and leave him with no relief. To the contrary, the Oregon court applied a longstanding statute that it had not previously been called upon to construe and provided petitioner and a large class of other federal retirees with a substantial remedy. Thus, whatever other States may be doing, *see* Pet. Cert. 8, Oregon has done at least as much as the Court has said that it must. That is, Oregon has provided a meaningful, backward-looking remedy to taxpayers who paid taxes found unconstitutional in *Davis*. Arguably, it has done more by providing refunds to taxpayers who did not apply for them.[14] Petitioner has had the full benefit of that remedy as have thousands of other federal retirees.

4. Because no federal retiree suffered any harm from his or her purported reliance on state law or officials, it should not be strictly necessary to respond to petitioner's claims of misinformation. Pet. Cert. 12–16. Nevertheless, because of the implications of the arguments asserted by petitioner and his amici, DOR addresses them briefly.

Petitioner cites four cases which, he asserts, establish "an unbroken line of precedent spanning over six decades" recognizing the right of taxpayers to obtain refunds and interest under the

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[13]TEI describes the invalidation refund statutes as "obscure." TEI Am. Br. at 12. It seems unlikely that TEI truly means to suggest that due process as applied in *Reich III* commands state courts to ignore a controlling statute simply because it is less well-known than another statute on the same general subject.

[14]It would be an odd rule that permitted a State to limit refunds to three years and require taxpayers to apply for them but prohibited it from providing the more uniform and broader, if shallower, relief afforded by the invalidation refund statutes.

general refund statutes when a tax law is declared unconstitutional. They are: *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939); *Smith, Kline & French Lab. v. State Tax Comm'n*, 241 Or. 50, 403 P.2d 375 (1965); *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988); and *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989). None of these cases holds that the general refund statutes apply when a tax law is invalidated.

In neither *Meredith* nor *Smith, Kline & French* was the Oregon Supreme Court called upon to declare a tax law invalid nor did it do so. Rather, in each case the court concluded that the State Tax Commission, predecessor to DOR, erroneously construed a state statute and therefore erroneously failed to exempt income from the tax. In other words, rather than hold a tax law invalid (the event that would trigger the application of OR. REV. STAT. § 305.765), the court held only that the tax commission had erroneously applied a statute to deny the taxpayer an exemption. As a result, in neither case were the invalidation refund statutes implicated.

Wood and *Borg* are similarly unhelpful to petitioner's contentions. While it is true that both cases ordered relief for the complaining taxpayer, neither specified the statute determining the extent of that relief. Specifically, neither the opinions of the Oregon Supreme Court nor the opinions of the Oregon Tax Court cite either the general refund statutes or the invalidation refund statutes in either case. *See Borg v. Department of Revenue*, 11 Or. Tax Rep. 67, 73 (1988) (ordering DOR to recalculate the taxpayer's income tax liability "in accordance with this opinion" without specifying the statutory basis for that order); *Wood v. Department of Revenue*, 10 Or. Tax Rep. 374 (1987). In *Wood*, the Oregon Supreme Court remanded the case to DOR "for

further proceedings consistent with this opinion" without specifying what that relief should be. *Wood*, 305 Or., at 33. *Borg* affirmed the judgment of the tax court without specifying the relief the taxpayer was to receive.

Petitioner places particularly heavy reliance on the Oregon Supreme Court's opinion in *Nutbrown v. Munn*, which petitioner reads to hold that taxpayers may pursue *Davis* refunds under the general refund statutes. Pet. Cert. 15–16. That reading of *Nutbrown* is patently unfounded.

The only issue before the court in *Nutbrown*, and the only issue the court purported authoritatively to *decide*, was whether federal retirees could pursue damages, injunctive or other tort-like relief in the form of an action under 42 U.S.C. § 1983, without first presenting their challenge through the administrative review process. The answer to that question depended, in turn, on whether they had remedies available to them through state administrative procedures. In concluding that the Oregon administrative process provides taxpayers with a forum for their claims, the Oregon Supreme Court left open precisely what form that remedy would take and how extensive it would be. It declared only that "[a]dministrative remedies available to the Taxpayers include a request for declaratory and injunctive relief, as well as for refunds" and, as in *Wood* and *Borg*, it nowhere identified under what statutes taxpayers would or should proceed. *Nutbrown v. Munn*, 311 Or., at 342. When *Nutbrown* was decided, the retroactivity of *Davis* appeared to many lower courts, including the Oregon court, to be an open question. The court, therefore, had no occasion to determine what specific remedy might be available because the court was not convinced that federal retirees were entitled to any remedy. Accordingly, when the plaintiffs in *Nutbrown* urged that the administrative

process would be futile because the state was denying any obligation to pay refunds for any tax year before 1989, the court responded: "The retroactivity of *Davis* (if it is otherwise controlling) doubtless will be an interesting issue. Certainly, however, the fact that this question is waiting in the wings does nothing to illustrate any futility to the administrative process." *Id.*, at 347. Beyond that, the court merely made it clear in the passage on which petitioners rely that the administrative process might well provide federal retirees with all relief that the constitution entitles them to receive.[15] In short, rather than provide a basis for petitioner's reliance on the general refund statute, *Nutbrown* instead should have served to place petitioner and other taxpayers on notice that the issue of what precise remedies for federal retirees could be obtained through state

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[15]Specifically, the court stated: "But the Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system." *Nutbrown v. Munn*, 311 Or., at 345 (emphasis in original). For petitioners to interpret this as a *holding* that taxpayers may pursue their claims under the general refund statutes is purely wishful thinking on their part. The plaintiffs in *Nutbrown* were not claiming an entitlement to refunds under the general refund statutes, nor under any other state statutory source. They were demanding federal tort relief. The court rejected the argument because it concluded that plaintiffs could pursue administrative remedies generally. The court recognized that the nature of those remedies might turn, at least in part, on what constitutional remedy was required, because the court's settled methodology is to construe statutes to meet constitutional requirements wherever possible. *E.g.*, *Oregon State Police Assn. v. State of Oregon*, 308 Or. 531, 537-39, 783 P.2d 7 (1989) *cert. denied* 111 S. Ct. 44 (1990). Indeed, in a later portion of the opinion, the court expressly acknowledged that if the available administrative remedies, even given the best possible construction, fell short of providing all relief constitutionally due to the taxpayers (such as the punitive damages the plaintiffs claimed), then in fact relief under section 1983 might be warranted. *Nutbrown v. Munn*, 311 Or., at 346. That the court was leaving for another day the question of what precise administrative remedies might apply, and how they would be construed in light of federal constitutional requirements, is plain from its full discussion.

administrative or judicial proceedings was an open question and remained for resolution.

Petitioner next tries to make a case for justifiable reliance on the general refund statutes by pointing to the positions taken by the Oregon Attorney General in the course of the *Nutbrown* litigation (litigation to which petitioner was not even a party). Specifically, petitioner relies on illustrations in appellate briefs in *Nutbrown*. As already discussed, the only issue in *Nutbrown* was the availability of an action under section 1983 in advance of pursuing whatever administrative remedies were available to the taxpayers. The question of which precise administrative remedy would apply was not before the court, and neither the court nor the parties had the occasion to examine it decisively.

Nevertheless, it is true that in the appellate briefing in *Nutbrown*, counsel for the state urged that administrative processes were available, and pointed specifically to the general refund statutes. In doing so, the state's briefing overlooked the more relevant and, as it would prove, controlling statute.[16] That can hardly be a basis on which petitioner can claim "justifiable reliance" on the general refund statutes. Even assuming that petitioner actually relied on the state's briefing (a claim that

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[16]As discussed next, at the same time that the state's appellate counsel pointed in the *Nutbrown* briefing to the general refund statutes to illustrate the administrative remedies, the state's general counsel attorneys had formally concluded and had officially advised the legislature that the invalidation statute properly would be the source of the remedy for taxes unconstitutionally collected under *Davis*. Although this office strives to avoid inconsistencies in its legal views or opinions, that is not always possible in an institution of this size. The difficulty of coordinating legal positions on these questions was aggravated by the fact that in *Nutbrown*, the question of what exact administrative remedies taxpayers were entitled to pursue was not an issue in the case, so that the direct advice being given by general counsel attorneys on that question was not called to appellate counsel's attention.

petitioner never in fact makes[17]), several factors would have made that reliance unreasonable: (1) the precise source or scope of available administrative remedies was not directly at issue in *Nutbrown*; (2) the Oregon Attorney General's legal position was not put before the court as a definitive or binding statement of the exact statutory remedies available to taxpayers, but to point to the availability of administrative relief generally; (3) the Oregon Attorney General's opinions are opinions only, they do not have the force and effect of law and they are not the law; private citizens and their attorneys must still consult the statutes enacted by the state's legislature. *Cf. In Re Sawyer*, 286 Or. 369, 381, 594 P.2d 805 (1979) (Attorney General opinions do not have the force and effect of law and are clearly not binding on a court); *Stephens v. Dept. of State Police*, 271 Or. 390, 394, 532 P.2d 788 (1975) (Attorney General's opinions are not even persuasive authority to the extent they conflict with the statutes enacted by the legislature).

Equally important, for petitioner to have relied on the appellate court briefing in *Nutbrown* requires petitioner to have ignored (unreasonably, we suggest) the more formal advice given by the Attorney General in contexts in which the State's legal position was more squarely on point. Contrary to petitioner's contentions, the Attorney General has advised state agencies for almost sixty years that the invalidation refund statutes apply when a tax law is stricken by the courts. Petitioner and TROA suggest that a formal opinion of the Attorney General (19 Op. Att'y Gen. 577 (1940), reproduced at Pet. Cert. 43a through 46a) states that the general refund statutes apply when a tax law is invalidated.

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[17]That is, petitioner makes no overture towards representing that he in fact was aware of the contents of the State's brief in *Nutbrown*, a case in which petitioner was not a party, or that he actually relied on those contents.

As explained earlier in footnote 6, however, that opinion was issued in response to *Meredith v. State Tax Comm'n.* When the Attorney General opined that "[b]ecause of its limited application [the invalidation refund statutes do] not seem material in this connection," Pet. Cert. 43a–44a, he was merely noting that no law had been invalidated in *Meredith*. The other general language of that opinion on which petitioner relies, Pet. Cert. 12–13, is equally silent on the subject of the effects of invalidating a tax law. More pertinent guides to the Attorney General's consistent position are an opinion issued before the one on which petitioner relies and another issued in 1989 after *Davis* was announced. In 1936 the Attorney General stated: "Chapter 337, Oregon Laws 1931, [predecessor to the current version of the invalidation refund statutes] provides for the refunding of taxes collected by the state under any law, or parts thereof, declared to be invalid by the court of last resort, and appropriates the amounts necessary to cover such refunds." 17 Op. Att'y Gen. 805, 807 (1936). In 1989, after this Court's decision in *Davis*, the President of the Oregon Senate and the Speaker of the House of Representatives asked the Attorney General about its effects on the State. With respect to the State's liability for refunds, the Attorney General advised: "[OR. REV. STAT. §] 305.765 governs refunds based on the invalidity of a statute under which a tax was paid." Oregon Letter of Advice to Senate President John Kitzhaber and House Speaker Vera Katz OP-6320 at 14 (May 10, 1989).

Finally, petitioner relies on DOR's pre-1992 lack of reference to the invalidation refund statutes in the materials it prepared in carrying out its responsibility to inform the public about paying taxes and obtaining refunds. Pet. Cert. 15. Consistent with his overall thesis, petitioner apparently seeks to suggest that DOR did not mention those statutes because they cannot reasonably be

read to apply. That objection is met by the Oregon Supreme Court's exacting explanation of why they do. That said, some reasonable person might contend, in hindsight, that DOR would have done better to include reference to those laws. It is understandable, however, why it did not. The invalidation refund statutes do not create a procedure by which taxpayers *claim* refunds; they create an obligation on the State to *pay* refunds after a specified event occurs. Under those statutes, a taxpayer does not file for a refund in the same way that he or she might for refund of a general overpayment. Instead, the taxpayer must file an action in which the statute can be declared invalid. Relief then flows as a matter of remedy to all affected taxpayers. No claim for a refund must be made and, therefore, it would make little sense for DOR to advise taxpayers how to process such a non-claim. Moreover, unless petitioner intends to suggest that the invalidation refund statutes have no possible application, DOR's lack of reference is necessarily ambiguous. Finally, the invalidation of a tax law, which is the only event triggering the application of those statutes, is infrequent enough to cast doubt on the utility of including a reference to them in material designed for the average taxpayer.

In summary, petitioner may claim to have relied on prior cases, on the decision in *Nutbrown v. Munn*, on the positions articulated by the Oregon Attorney General's office, and on DOR's materials. That reliance, however, was not justifiable, both because none of those should have served to mislead petitioner in the first place, and because in any event, none of them excuse petitioner from consulting the statutes themselves. As important, however, petitioner's purported "reliance" here should be beside the point, because this case is not analogous to the circumstances presented in *Reich*. Unlike Georgia, Oregon

has a pre-existing, backward-looking refund statute that controls the availability of refunds. Also unlike *Reich*, no Oregon federal retiree was duped into giving up the process for obtaining a refund, nor has any federal retiree claimed that he or she has been denied an actual refund. The only objection here is that federal retirees did not get the remedy they preferred. Those facts alone distinguish this case from *Reich* and bring it instead squarely within the holding in *McKesson*.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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PETITIONER'S REPLY BRIEF

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December 6, 1995

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PETITIONER'S REPLY BRIEF

I. RESPONDENT, DISAGREEING WITH *HARPER* AND *REICH*, HAS SIMPLY IGNORED THEM.

The respondent's brief in opposition is another example of Thrasymachus' approach to justice, which controlled below.[1] Indeed, this approach has controlled Oregon's decade long war of attrition to thwart federal retirees' efforts to enforce 4 U.S.C. § 111.[2]

Despite the respondent's determined efforts to obfuscate the important federal questions presented by this petition, several things nevertheless, remain clear:

—Oregon has refused to give full retroactive effect to this Court's decision in *Davis* in *this* case (and in thousands of other *Davis*-related pending claims), which irrefutably is open on direct review. *See* Or. Rev. Stat. § 305.265(5), Pet. App. E, 38a.[3]

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[1] "[E]ven false propaganda and the appropriation of private property would be just whenever the ruler is strong enough to impose his will on his subjects." John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U.L. Rev. 1121 (1993).

[2] The respondent asserts that no federal retiree has been *"duped,"* Br. in Opp'n at 25, by its bait and switch tactics. While *"duping"* is not the constitutional standard, since at least the 1985 session of the Oregon legislature, federal retirees have continuously sought to vindicate their rights under 4 U.S.C. § 111 in full reliance on their state refund rights. *See, e.g.*, Hearings of The Joint Committee on Retirement Tax Equity, April 20, 1989. In addition, they actively supported, through the National Association of Retired Federal Employees and The Retired Officers Association, the original two designated national test cases of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986).

[3] One of the many anomalies of the respondent's brief is its boast of its generous response to *Davis*. It is worth noting that for over three years Oregon refused to give even prospective effect to *Davis* because, in its view, the Court was wrong in *Davis*. *See, e.g., Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131, 142 (1991), *cert. denied*, 502 U.S. 1030 (1992) ("[T]he *Davis* case was wrongly decided.") And now, despite its misleading suggestions to the con-

—There is not a single case prior to Oregon's *1992 switch* that put any limiting construction on Oregon's omnibus refund statutes under Oregon's Personal Income Tax Act.

—The refund relief sought in this case is identical in all respects to that awarded to federal employees in *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939).[4]

—The respondent has held out to this Court and for over *sixty years* to taxpayers in general that the omnibus refund statutes provide a clear and certain remedy for these taxes and has now declared, only after these disputed taxes have been paid, that no such remedy exists.

—Even now, it is neither clear nor certain how a taxpayer invokes Oregon's 1992 reconfigured remedial scheme.[5]

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trary, the *only* relief that Oregon has provided is prospective—it relates *solely* to tax liabilities *first* "due and payable" after this Court's decision in *Davis*. *See Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971, 977 (1992) (ordering refunds of only those taxes due and payable on or after April 15, 1989).

[4] *Meredith* held that "Section 207 of Title II [of the Public Salary Tax of 1939] prohibited[ed]" the imposition of taxes upon the *current* compensation of federal employees under Oregon's Personal Income Tax Act. *Id.* at 312-13. These *"illegally collected [taxes] under mistake of law"* were refunded to all federal employees, with full interest for *all* years prior to 1939, who had filed refund claims under the omnibus refund statute. *See* 19 Op. Att'y Gen. 577 (1940) (emphasis added), Pet. App. F, 43a. This was so because the omnibus refund statutes "provide the express authority" to refund taxes collected *"illegally"* in violation of federal law. *Id.* It is disingenuous at best for the respondent to assert that the very same violation of the Public Salary Tax under the same state tax act is now different. The respondent's position is precisely the type of "*[n]ovelty in procedural requirements*" condemned in *Reich v. Collins*, 115 S. Ct. 547, 551 (1994).

[5] According to the respondent's latest position, a taxpayer does not file a claim for refund to obtain refunds but must instead file an action in which the statute can be declared invalid. Br. in Opp'n at 24. Yet, the only action authorized by law is a claim for refund after exhausting the omnibus refund statutes administrative

The respondent devotes an inordinate effort to justifying in hindsight the correctness of the decision announcing Oregon's reconfigured scheme. However, that effort misses the mark. The dispositive question is not the soundness of the decision but rather what the "average" "reasonable" taxpayer understood at the time the taxes were paid. *Reich v. Collins*, 115 S. Ct. 547, 550 (1994). Certainly, if it were reasonable for respondent's appellate counsel to have overlooked Oregon's reconfigured scheme in a brief filed before the United States Supreme Court in 1991, the "average" "reasonable" taxpayer could not be faulted for overlooking the same thing when the taxes were imposed. At bottom, prior to Oregon's *1992 switch*, "no reasonable taxpayer would have thought," in light of the mandatory refund claim requirements of the omnibus refund statutes, that filing an action to invalidate represented the exclusive remedy for *some* unlawful taxes. *Id.* Similarly, there is no question that for over sixty years, Oregon "did appear to hold out a 'clear and certain' postdeprivation remedy." *Id.* Thus, the "average taxpayer," *id.*, would reasonably have understood Oregon's omnibus refund statutes as the available remedy.[6]

Respondent suggests that petitioner and the forty thousand other federal retirees whose claims are still pending have no reason to complain because they had no idea before *Davis* that the taxes they were paying were unconstitutional. Oregon's argument here is no more persuasive than the very same argument rejected by the Court in *Reich*. "If the argument is that [petitioner] would not have taken advantage of the State's [action to invalidate] no matter how adequate [it was] (and thus had no stand-

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process. *See* Or. Rev. Stat. § 305.419 ("The complaint *shall* be filed as a claim for refund.") (Pet. App. E, 39a).

[6] The reasonableness of that understanding is indisputable. It was shared by the justices of the unanimous courts in *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988); *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989); and *Nutbrown v. Munn*, *supra*. In addition, until the *switch*, it was shared by the legislature, the respondent and even respondent's appellate counsel here. *See* note 11, *infra*.

ing to complain of those remedies), the argument is beside the point: [petitioner] was entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy regardless of the State's [*action to invalidate*]." *Reich*, 115 S. Ct. at 551. Similarly, petitioner did not need to have known of the unconstitutionality, because Oregon's "refund statute had a relatively lengthy statute of limitations period, and, at least, until [Oregon's *switch*] contained no contemporaneous protest requirement [of commencing an *action to invalidate*]." *Id.*

Of course, Oregon's *switch* is not unique. It comes directly from the States' Attorneys General playbook. It is strikingly similar to the *Reich*-like *switches* attempted by several states in the wake of this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). For example, upon remand of *Bass I* for reconsideration of its prospectivity holding in light of *Beam*, the South Carolina Supreme Court in *Bass II* reconfigured South Carolina's remedial scheme. It construed South Carolina's refund statute which provided a refund remedy for "any taxpayer [for] *any* license fee or tax imposed under [the taxation title] . . ." to reach only "license-type fees and taxes." *See Bass v. South Carolina*, 307 S.C. 113, 414 S.E.2d 110, 112 (1992), *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993). In the wake of *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), South Carolina was forced to acknowledge its due process refund obligation and paid the refunds originally ordered by the trial court in *Bass I*.[7] Here, of course,

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[7] *See also Harper v. Virginia Dep't of Taxation*, 462 S.E.2d 892, 896-97 (Va. 1995) (*"Harper III"*) (rejecting Virginia's construction that its refund statutes are discretionary and not mandatory); *Dart Indus., Inc. v. Clark*, 657 A.2d 1062, 1066 (R.I. 1995) (rejecting the tax administrator's contention that the terms " 'overpayment' " and " 'erroneous payment' " in the state's general refund statute should be construed to disallow a refund for " 'illegal' " or " 'unauthorized' " taxes); *Lewis Ford, Inc. v. Huddleston*, 1995 WL 607555, *4 (Tenn. Ct. App. Oct. 17, 1995) (holding legislative reconfiguration of refund claim period from three years to one month without notice violates *Reich*).

the respondent just executed the plays in a slightly different order. It first attempted a *Reich II*, claiming that the petitioner had an adequate predeprivation remedy. This in large measure carried the day before the Oregon tax court. *See* Pet. App. 26a. However, in the wake of the Court's decision in *Reich II*, the respondent and the court below expediently reversed field to reconfigure Oregon's scheme by using the technique rejected by this Court in *Reich I* of "construing the refund statute not to apply to . . . [a] law . . . subsequently declared to be unconstitutional or otherwise invalid." *Reich*, 115 S. Ct. at 549 (citation omitted).[8]

II. OREGON IS PLAYING "*FAST AND LOOSE*"[9] WITH THIS COURT.

To thwart review in this Court, the respondent makes a number of assertions which are demonstrably untrue. First, Oregon attempts to avoid *Nutbrown* by now asserting that *Nutbrown* did not involve a claim for refunds and did not address which "precise administrative remedy would apply." *See, e.g.*, Br. in Opp'n at 20 n. 20, and 21. In *Nutbrown*, the taxpayers' complaint, including their claim for refunds, was dismissed, futility notwithstanding, for failure to allege compliance with the exhaustion of

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[8] Respondent's sole claim that it is different from Georgia is that Oregon dusted-off an irrelevant statute as the basis for denying refunds, whereas Georgia created a rule. This is yet another one of respondent's distinctions without a difference. In both this case and *Reich*, no "reasonable" taxpayer would have thought, in light of the general refund statutes available in each state, that the rules created by the courts provided the exclusive remedy for unlawful taxes. *Reich*, 115 S. Ct. at 550. And, in all events, the respondent's assertion misses the mark. Sixty years of Oregon precedent establishes that Oregon's reconfigured scheme was cut from the same whole cloth that was used by Georgia in *Reich*.

[9] *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). "Judicial estoppel looks to the connection between the litigant and the judicial system." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993). "It preserves the integrity of the courts by preventing litigants from 'playing fast and loose with the courts.'" *Id.* (citation omitted).

administrative remedies provided under the omnibus refund provisions. The available, adequate, and mandatory administrative remedies identified by the respondent in *Nutbrown*, indeed the *only* administrative remedies provided by Oregon law under the Personal Income Tax Act for refund claims, were Oregon's omnibus refund provisions. *See, e.g.*, Pet. App. G at 47a; App. H at 48a-49a.[10] The Oregon Supreme Court definitively held that under Oregon's omnibus refund provisions:

> [T]he Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system.

Nutbrown, 811 P.2d at 141 (emphasis in the original).[11]

Respondent's proffered explanation for why it should not be held to its positions before this Court and the holding of the Oregon Supreme Court in *Nutbrown* is untenable. *See, e.g.*, Br. in Opp'n. at 21 n.16. Whatever problems there may have been in communication among members of the Attorney General's Office, such problems, if any, did not result in an inadvertent oversight by the respondent's appellate counsel. Respondent's appellate

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[10] *See also* Respondent's Brief in Opposition in *Nutbrown v. Munn*, U.S. No. 91-457 (December 5, 1991) at 12 ("Petitioners do not suggest that DOR lacks the authority to grant them the refunds they seek. . . .").

[11] Equally disingenuous is the respondent's suggestion that neither it nor the legislature was aware of the clear and certain Oregon three year refund remedy available to federal retirees in the wake of *Davis*. The respondent advised all federal retirees "who paid taxes on a governmental pension in 1985 [to] file a 'protective claim' or an amended tax form by April 17, when the three-year limit on changing 1985 tax claims ends." *See* "Calls From Retirees Pour Into Tax Agency," *Oregonian*, April 5, 1985 at D8. Similarly, on April 5, 1989, House Speaker Vera Katz stated that Oregon's revenue loss for the two year budget period commencing July 1, 1989 "would rise to $170 Million [$100 million of which represented Oregon's liability for refunds] if any refunds are made retroactive for three years, the maximum time span allowable by tax law." *See* "Oregon Will Study Pension Ruling," *Statesman Journal*, Salem, Ore., April 5, 1989, at 3C. *See also* note 2, *supra*.

counsel was fully aware of Oregon's change in position to "reconfigure its scheme, unfairly, in *midcourse*. . . ." *Reich*, 115 S. Ct. at 550. As estabilshed by the appearances of record in *Nutbrown* and *Ragsdale*, the respondent was represented by the *same* appellate counsel in each case.[12] Therefore, when the respondent's appellate counsel asserted to this Court in its *December 5, 1991* brief in *Nutbrown* that this Court should deny the petition because Oregon's omnibus refund provisions provided an *adequate* remedy, appellate counsel knew that the respondent had already implemented the "switch" in *Ragsdale*. Respondent's appellate counsel orally argued the "switch" in *Ragsdale* on *July 10, 1991*. *See Ragsdale*, 823 P.2d at 971. Nothing was overlooked as the respondent now claims. The reason for the respondent's *switch* in *Ragsdale* and here is self-evident. In the wake of this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the remedy game had changed. The respondent recognized that it would no longer be able to avoid its refund obligation by claiming that *Davis* should be given prospective effect so it executed the plays from the States' new remedy playbook.

Finally, through euphemism,[13] respondent purports to

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[12] *See Nutbrown*, 811 P.2d at 132; *Ragsdale*, 823 P.2d at 972. *See also* Respondent's Brief in Opposition, *Nutbrown v. Munn*, U.S. No. 91-457 at 16. In addition, respondent's *general counsel* appeared at oral argument in *Nutbrown*.

[13] Respondent now refers to all earlier cases in which refunds were made to taxpayers based upon the unconstitutional imposition of taxes under the omnibus refund statutes as not involving a tax law's "invalidity," but cases in which Oregon merely "erroneously applied a statute to deny the taxpayer an exemption." (Br. in Opp'n at 18). This Machiavellian distinction without a difference by no means can be justified under the "average, reasonable taxpayer" test announced in *Reich*. Under the respondent's view, declaring a tax invalid under the feedral constitution is supposedly different from declaring that the federal constitution: does not permit the imposition of tax, requires that income be exempt from tax or, as in this case, requires a declaration of equal treatment. This case is the identical twin of *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939). Yet, respondent seemingly asserts

explain away an unbroken line of Oregon precedent spanning over six decades establishing the right of taxpayers to obtain refunds under the omnibus refund statute for all taxes subsequently declared invalid or unconstitutional. Respondent's position is untenable.

In *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989), the Oregon Supreme Court expressly applied the "nondiscrimination rule of *Davis v. Michigan Dep't of Treasury*" in invalidating Oregon's discriminatory scheme of taxing federal obligations and affirming the tax court's judgment ordering refunds with full statutory interest under Or. Rev. Stat. § 305.270. *Id.* at 1101-02.[14] The respondent now claims that is not so. However, the judgment of the tax court affirmed in *Borg* establishes that full refunds with interest under the omni-

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that the unlawful imposition of taxes upon *current* federal compensation is entitled to full refund relief because the State erroneously failed to exempt income while the same tax on *deferred* federal compensation sixty years later is entitled to no relief because it was necessary to invalidate the state's failure to exempt the same compensation.

[14] Similarly, in *Smith, Kline & French Lab. v. State Tax Comm'n*, 241 Or. 50, 403 P.2d 375 (1965), refund relief for Oregon's unconstitutional taxes was only available under the omnibus refund statute. The facts reflect that Smith Kline paid Oregon income taxes for years 1955 through 1958 in *May of 1958*. *Id.* at 403 P.2d at 376. The facts further reflect that Smith Kline did not seek administrative relief until *September 1960*. *Id.* The Oregon Supreme Court specifically reversed the tax court's denial of refunds and held that the state statute under which the taxes were imposed must yield under the Commerce Clause. *Id.* at 380. The holding of the Oregon Supreme Court in *Smith Kline* would *not* have been possible under Oregon's reconfigured scheme because Smith Kline did not take any step, let alone commence an action, until *1960*, well after the year in which the taxes were paid. Just as unpersuasive is the respondent's discussion of *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988). In *Wood*, the court specifically held that "ORS 316.127(1)(a) violates plaintiffs' claimed federal constitutional rights" and reversed the tax court's denial of refunds for 1979, 1980 and 1981. *Id.* at 25.

bus refund statute were ordered, calculated and paid by the respondent.[15]

The positions advanced by the respondent directly implicate the integrity of the certiorari process. Having successfully evaded review for its constitutional violations in *Nutbrown*, the respondent should not be permitted to escape review here by its facile repudiation of the existence of the very remedy upon which it urged no review was necessary in *Nutbrown*. As the Court held over a hundred years ago, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Accordingly, this Court should grant the petition and order the respondent to provide the *adequate* three-year refund remedy which Oregon asserted was available and which the Oregon Supreme Court held was available to federal retirees in *Nutbrown*.

III. EVEN IF THE RESPONDENT'S POSITION WERE DEEMED TO HAVE MERIT, THIS CASE THEN PRESENTS THE VERY ISSUE FOR WHICH CERT. WAS GRANTED, BUT NOT REACHED, IN *REICH*.

In *Reich*, the court granted certiorari limited to Question 1. *Reich*, 114 S. Ct. 1048 (1994). On the merits in *Reich*, it was unnecessary for the Court to resolve the question presented of whether the state had provided a clear and certain remedy. Here, the respondent asserts that a taxpayer may be forced to act at his "*peril*" in an exclusively post-deprivation state remedial scheme with-

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[15] If respondent's current assertion were true, no interest would have been adjudged in *Borg* or *Waterbury*. Under Oregon's newly reconfigured scheme, no interest is paid. *See Pendell v. Department of Revenue*, 315 Or. 608, 847 P.2d 846 (1993). The relevant excerpts from the tax court's judgment in *Borg* and the companion case *Waterbury v. Department of Revenue*, 11 Or. Tax 314 (Or. T.C. 1989), reflecting refunds calculated under the omnibus refund statute, appear in the Appendices to this brief at 2a and 8a.

out offending the Constitution's mandate that states must provide a clear and certain remedy. The position advanced by the respondent is in irreconcilable conflict with the decisions of this Court. *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 39 (1990) ("[T]he State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy. . . .' ") (footnote and citation omitted). It is also in conflict with the decisions of state courts of last resort. *See, e.g., Cambridge State Bank v. James,* 514 N.W.2d 565, 570 (Minn.). *cert. denied,* 115 S. Ct. 663 (1994) (because the avenue for challenging the tax was discernible only with hindsight, "this mechanism [did not] provide[] the 'meaningful opportunity' called for by McKesson."); *Lewis Ford, Inc. v. Huddleston,* 1995 WL 607555, *3 (Tenn. Ct. App. 1995) ("[I]t cannot be said that a taxpayer must be clairvoyant. . . ."). Thus, this Court should grant the petition to resolve the important and recurring federal question of the appropriate contours of a state remedy that is adequate to satisfy the due process requirement of "a clear and certain remedy."

CONCLUSION

It is ironic that respondent invokes Lord Macaulay to support its assault on the petitioner's constitutional rights. While it may appear to respondent and Lord Macaulay that "[*our*] *Constitution* is all sail and no anchor," T.B. Macaulay, letter to H.S. Randall, May 23, 1857 (emphasis added), certainly that cannot be so "while this Court sits." *Panhandle Oil Co. v. State,* 277 U.S. 218, 223 (1928) (Holmes, J. dissenting). Respondent and apparently the court below have forgotten the fundamental principle that the Constitution is the Supreme Law of the Land. Thus, this petition must be granted and the decision below reversed in order to affirm that, even in Oregon, the Constitution is the Supreme Law of the Land.

Respectfully submitted,

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December 6, 1995

APPENDIX A

IN THE OREGON TAX COURT

Income Tax

No. 2410

EILERT R. & SALLY S. BORG,
Plaintiffs,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

JUDGMENT

In accordance with the written decision of this court, dated and filed August 12, 1988;

IT IS ORDERED AND ADJUDGED:

* * * *

3. No objections having been made to the recomputations submitted by defendant as required by the court, plaintiffs' 1981 and 1982 Oregon Personal Income Tax liability is as shown by the attached computations, marked Exhibits A, B, C and D, and by this reference made a part of this judgment.

3. Costs to neither party.

DATED on September 13th, 1988.

/s/ Carl N. Byers
Oregon Tax Court Judge

Exhibit B

OREGON DEPARTMENT OF REVENUE

REVISED

AUDITOR'S REPORT

BORG, EILERT 516-22-5435
BORG, SALLY 543-24-7668
15441 S. HIGHLAND ROAD
OREGON CITY OR 97045

* * * *

Please contact me if you have any questions.

	NF Penalty: 0%	
	Interest starting date: 04/16/82	92.75
	Interest on underpayment of estimated tax	
	Warrent charges	
	Less: Payment received	<340.18>
AUDITOR: THERESA SCHUH	TOTAL Refund Balance due	111.43
Case No. 082388	Interest on refund	63.06
TELEPHONE: (503) 376-8048	Less offsets to liabilities	
150-101-112	REFUND	174.49

Exhibit D

OREGON DEPARTMENT OF REVENUE

REVISED

AUDITOR'S REPORT

BORG, EILERT 516-22-5435
BORG, SALLY 543-24-7668
15441 S. HIGHLAND ROAD
OREGON CITY OR 97045

* * * *

Please contact me if you have any questions.

NF	Penalty: 0%	
	Interest starting date: 04/16/83	71.37
	Interest on underpayment of estimated tax	
	Warrent charges	
	Less: Payment received	<576.01>
	TOTAL Refund Balance due	286.64
	Interest on refund	162.26
	Less offsets to liabilities	
	REFUND	448.90

AUDITOR:
THERESA SCHUH
Case No. 082388
TELEPHONE:
(503) 376-8048
150-101-112

CERTIFICATE OF SERVICE

I certify that on August 31, 1988, I served the foregoing Judgment upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Leo A. Reinikka
Attorney at Law
900 SW Fifth Avenue, Suite 1850
Portland, OR 97204-1227

/s/ Ted E. Barbera
TED E. BARBERA
Senior Assistant Attorney General

[Filed May 31, 1989]

IN THE SUPREME COURT
OF THE STATE OF OREGON

EILERT R. BORG and SALLY S. BORG,
Respondent/Cross-Appellants,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Appellant/Cross-Respondent.

(TC 2410; SC S35615)

In Banc

On appeal from the Oregon Tax Court. Carl N. Byers, Judge.

Argued and submitted April 4, 1989.

Leo A. Reinikka, of Case, Dusterhoff & Mehlhaf, Portland, argued the cause and filed briefs for respondents/cross-appellants.

Ted E. Barbera, Sr. Assistant Attorney General, Salem, argued the cause for appellant/cross-respondent. With him on the briefs was Dave Frohnmayer, Attorney General, Salem.

LINDE, J.

The decision of the Oregon Tax Court is affirmed.

IN THE OREGON TAX COURT

Income Tax

No. 2410

EILERT R. & SALLY S. BORG,
Plaintiffs,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

JUDGMENT ENFORCING APPELLATE JUDGMENT

On the Court's motion, and at the direction of the Supreme Court as set forth in its opinion enforceable August 16, 1989,

IT IS HEREBY ORDERED by the Court that the opinion be entered herein. Pursuant to the provisions of said opinion,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the judgment previously entered herein on September 13, 1988, be affirmed all respects.

Dated this 16th day of August, 1989.

/s/ Carl N. Byers
Judge

APPENDIX B

IN THE OREGON TAX COURT

Income Tax

No. 2653

HOLDEN N. WATERBURY,
Plaintiff,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

AMENDED JUDGMENT

Based on the stipulation of the parties and the findings of the court, the judgment previously entered September 18, 1989, is hereby amended to provide as follows:

IT IS ORDERED AND ADJUDGED:

* * * *

5. Plaintiff's 1981, 1982 and 1983 Oregon personal income tax liability is as shown by the attached computations, marked Exhibits A, B, C and D, and by this reference made a part of this judgment.

6. Plaintiff is entitled to recover attorney fees from defendant in the amount of $4,180.

Dated this 7th day of November, 1989.

/s/ Carl N. Byers
Judge

Exhibit A

OREGON DEPARTMENT OF REVENUE

REVISED

AUDITOR'S REPORT

Waterbury, Holden N. 002-16-3573
Waterbury, Olga A. 465-09-8813
PO Box 5122
Bend OR 97708

* * * *

Please contact me if you have any questions.

NF	Penalty: 0%	
	Interest starting date: 04/16/82	804.55
	Interest on underpayment of estimated tax	
	Warrent charges	
	Less: Payment received 9-23-87	<3,114.27>
	TOTAL Refund Balance due	<1,463.72>
	Interest on refund from 9-24-87	
	Less offsets to liabilities	

AUDITOR:
Susan J. Hicks
Case No. 082189
TELEPHONE:
(503) 378-8048

Exhibit C

OREGON DEPARTMENT OF REVENUE

REVISED

AUDITOR'S REPORT

Waterbury, Holden N. 002-16-3573
Waterbury, Olga A. 465-09-8813
PO Box 5122
Bend OR 97708

* * * *

Please contact me if you have any questions.

NF Penalty: 0%	
Interest starting date: 04/16/83	87.88
Interest on underpayment of estimated tax	
Warrent charges	
Less: Payment received	<984.25>
TOTAL Refund Balance due	<731.37>
Interest on refund from 9-24-87	
Less offsets to liabilities	

AUDITOR:
Susan J. Hicks
Case No. 082189
TELEPHONE:
(503) 378-8048

Exhibit D

OREGON DEPARTMENT OF REVENUE

REVISED

AUDITOR'S REPORT

Waterbury, Holden N. 002-16-3573
Waterbury, Olga A. 465-09-8813
PO Box 5122
Bend OR 97708

* * * *

Please contact me if you have any questions.

NF	Penalty: 0%	
	Interest starting date: 04/16/84	39.68
	Interest on underpayment of estimated tax	
	Warrent charges	
	Less: Payment received 10-9-85 & 9-23-87	<691.58>
	TOTAL Refund Balance due	<502.90>
	Interest on refund from 9-24-87	
	Less offsets to liabilities	

AUDITOR:
Susan J. Hicks
Case No. 082189
TELEPHONE:
(503) 378-8048

(7)

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-279

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM T. ATKINS,

Petitioner,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oregon

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
*VIRGINIA L. LINDER
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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Oregon files this brief to supplement its Response in Opposition to the Petition for Certiorari, pursuant to Supreme Court Rule 15. In doing so, the State's purpose is limited. The State is not attempting to protract the legal arguments further. Much of petitioner's Reply Brief, however, focuses on certain inconsistencies in the legal position the State has taken in this litigation, as compared to that in litigation that pre-dated this case and involved other parties. Petitioner's point about those inconsistencies goes beyond advocacy on the merits and borders on charging the State's attorneys with ethical misconduct. More specifically, petitioner suggests that the State deliberately cited inapplicable authority to the appellate courts and intentionally misled the courts in order to gain a strategic advantage in the cases then before the courts. Reply Br. 6–7, 9. Those are serious charges, ones that call for the State's response. Therefore, as officers of the Court, the State's attorneys are taking the unusual step of placing before the Court the personal affidavit of the attorney who appears to be the object of petitioner's attack and offering it as a supplement to the State's response in opposition.[1]

By way of background, the central theme of the petition for certiorari is that the State of Oregon, acting through various state officials, deprived petitioner of a remedy for refund of certain unconstitutionally collected taxes by engaging in the "bait and switch" tactics that this Court disapproved in *Reich v. Collins*, 513 U.S. ___, 115 S.Ct. 547 (1994). At the Court's request, the State filed a response to the petition. The State's argument, *inter*

---

[1]The State is separately submitting the original affidavit to the Court with the Supplemental Brief. The appendix contains a copy of the original.

alia, is that this case is legally distinguishable from *Reich* because here the state had in place a pre-existing remedial statute that applies to petitioner's circumstance. Whatever reliance petitioner may have placed on other remedial statutes neither was reasonable nor deprived him of a constitutionally adequate remedy. The State also responded to petitioner's claims that the State took a contrary position before both the Oregon Supreme Court and this Court, in other litigation not involving this petitioner, by pointing to the other remedial statutes (the "general refund statutes") as a source of a remedy for claims such as petitioner's. Petitioner suggests, but does not squarely assert, that he may have relied on the State's legal arguments in those cases to which he was not a party.

The State responded that its appellate counsel was not at that stage taking a definitive position on which administrative remedies would apply to refund claims like petitioner's, but was only asserting in a general way that adequate administrative remedies are available. Moreover, the State urged that if the State's legal representations were relevant, then also relevant was the legal advice simultaneously being given to the state legislature by other attorneys in the Oregon Department of Justice. Those attorneys concluded that the "invalidation refund statutes" applied to petitioner's precise type of claim, advice not communicated to the appellate counsel. Br. In Opp., at p. 21, n. 16.

Petitioner has now filed a Reply Brief, taking issue with the State's argument in various respects, but particularly taking issue with the State's description of its oversight in citing to the general refund statutes in earlier litigation. In his reply, petitioner asserts that the State's description is demonstrably incorrect, and he specifically points out that the appellate counsel had in fact cited the invalidation statutes as well in earlier rounds of

litigation involving other parties, and thus was aware of the existence and application of those statutes. Reply Br. 6–7.

Petitioner is both right and wrong. Petitioner is right in his objective recitation of the facts: that is, that the same appellate counsel who argued to the Oregon Supreme Court in July of 1991 that the invalidation refund statutes apply when a tax law is struck down also cited the general refund statutes to this Court in December of that same year. Petitioner is incorrect in attributing a sinister motive to what at best qualifies as an inadvertent error. As set out in the affidavit of Oregon Assistant Attorney General Robert M. Atkinson, which is appended to this brief, that citation was the product of oversight, not of an intent to mislead or some other corrupt design. As also explained in that affidavit, the citation related to a collateral point, one that likely played little or no role in the Court's assessment of the merits of the legal question presented, and that therefore may not have been examined or researched as extensively as other legal arguments in the case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
Counsel for Respondent

December 21, 1995

No. 95-279

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM T. ATKINS,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Respondent.

AFFIDAVIT

I, Robert M. Atkinson, do depose and say:

1. I am employed by the Oregon Department of Justice as an Assistant Attorney General in the Appellate Division. I was assigned to write the State's Oregon Supreme Court briefs in both *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), and *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992). I was also the primary author of the State's Brief in Opposition to Certiorari in *Nutbrown v. Munn*, No. 91-457.

2. Plaintiffs in *Nutbrown* argued, both in the Oregon courts and in this Court, that because they brought their claims under 42 U.S.C. § 1983, they were excused from the statutory requirement that they exhaust available administrative remedies. In response, I argued in the Oregon Supreme Court that in cases challenging tax laws, as opposed to challenges to other state action brought under section 1983, adequate administrative remedies must first

be exhausted. I relied in part for that argument on this Court's opinion in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). In describing the state's administrative procedures for obtaining refund of taxes to the Oregon Supreme Court, I cited Or. Rev. Stat. §§ 305.270 and 314.415, the "general refund statutes." Although the attorneys in the tax section of our General Counsel Division had cited Or. Rev. Stat. §§ 305.765 through 305.785, the "invalidation refund statutes," to the Tax Court, I was unaware of the existence of those statutes when I prepared the brief in the Oregon Supreme Court.

3. When I wrote the brief in opposition to the petition for certiorari in *Nutbrown*, I adopted whole sections of the brief I filed in the Oregon court and made relatively minor changes to other sections of that brief. The petitioners argued, *inter alia*, that they should be excused from the exhaustion requirement because the administrative process was "burdensome." Again I cited to and relied on *Rosewell*. In *Rosewell*, the Court held that under the federal Tax Injunction Act, state remedies are adequate if the combination of administrative procedures and available judicial review provides "a full hearing and judicial determination of the controversy." I argued first that the same standard should apply, even though *Nutbrown* did not involve that federal Act. I argued further that because Oregon provides a full hearing before DOR, followed by available judicial review in the Tax Court and the Oregon Supreme Court, it met the *Rosewell* standard. Then I added: "Moreover, the Illinois system [at issue in *Rosewell*] provided no interest to the ultimately victorious taxpayer, unlike the Oregon system. *See* Or. Rev. Stat. §§ 305.220, 305.222, 305.270 and 314.415." In context, the reference to interest was not central, or even particularly significant, to our argument

inasmuch as the Illinois statutes that survived constitutional scrutiny in *Rosewell* did not provide interest.

4. After I filed the *Nutbrown* brief in the Oregon Supreme Court and before I filed the brief in opposition in that same case in this Court, I briefed and argued *Ragsdale* to the Oregon Supreme Court. In *Ragsdale* a federal retiree sought a refund of all taxes ever paid on her federal pension. I argued that the invalidation refund statutes, not the general refund statutes, applied. At the time I filed the brief in opposition in *Nutbrown*, *Ragsdale* remained under advisement in the Oregon Supreme Court. *Ragsdale* was decide on January 3, 1992, after the brief in opposition in *Nutbrown* was filed.

5. I cannot explain why I did not recognize at the time I wrote the brief in opposition in *Nutbrown* that if we prevailed in *Ragsdale*, it would be the invalidation statutes, not the general refund statutes, that would apply. It appears that I simply relied on what I had said in the *Nutbrown* brief I filed in the Oregon court and used it again without considering the implications for that argument of a holding in *Ragsdale* that the invalidation refund statutes and not the general refund statutes applied. I did not intend to mislead this Court by the citation to the general refund statutes. That citation was simply an oversight.

/s/ Robert M. Atkinson
Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 18 day of December, 1995.

/s/ Linda K. Miller
Notary Public for Oregon
My Commission Expires: 6/19/99